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JENKS'

ENGLISH CIVIL LAW

FOURTH EDITION

BY

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BOOK III

PROPERTY

Abbreviations :

A E.A.	... Administration of Estates Act.
L.C.A.	... Land Charges Act.
L.P.A.	... Law of Property Act.
L.R.A.	... Land Registration Act.
S.L.A.	... Settled Land Act.
T.A.	... Trustee Act.
L.P.(Am.)A.	... Law of Property (Amendment) Act.

PART I

PROPERTY GENERAL

SECTION I

THINGS

1024. The word “thing” is used in English Law *This* to include (i) material objects, not being living human bodies, (ii) rights or collections of rights. The sense in which the word is used is to be gathered from the context in each case.

Students of English Law will, it is to be feared, be unable to rely upon the complete accuracy or consistency of the language used by its sources, whether these are statutory or judicial. Generally speaking, however, the use of the word “thing” in these sources connotes two qualities : (i) that the “thing” alluded to is (or may be) the subject-matter of rights and duties, (ii) that it is (or may be) regarded by the law as *property*. It does not, however, necessarily connote the quality of alienability. See *Pollock, First Book of Jurisprudence* 6th Ed. pp. 130-141 ; *Holland, Jurisprudence* 13th Ed. pp. 101-107 ; *Salmond, Jurisprudence* 10th Ed. pp. 259 ; 272-274 ; *Paton, Jurisprudence* pp. 275-286 for definition and classification of things.

Things real

1025. "Things real" include (i) all interests in land held by socage (§1035, n.), tenure,^(a) (ii) all chattels, such as heirlooms, which, unless alienated *inter vivos*, devolve along with interests in land on the death of their owner,^(b) (iii) peerages, offices, franchises, dignities, and other public rights which are treated as property,^(c) (iv) shares in certain companies owning interests in land.^(d)

(a) *Torre v. Brocane* (1855), 5 H.L.C. 555, 571. The laxer rules of interpretation applied to the language of testaments allow the expression "real estate" and its equivalents to include leaseholds in certain cases (*Re Holt, Holt v. Holt*, [1921] 2 Ch. 17). But leaseholds are, properly speaking, "chattels real".

(b) *Hill v. Hill*, [1897] 1 Q.B. 483. The term is often used loosely to include chattels which, by the terms of a settlement, are limited to follow the devolution of land. But, strictly speaking, a chattel cannot be made an heirloom by act of the parties.

(c) As to these, see §§ 1129-1169 *post*.

(d) *Drybutter v. Bartholomew* (1723), 2 P.Wms. 127.

Buckeridge v. Ingram (1795), 2 Ves. 652. Shares in a company governed by the Companies Clauses Act, 1845, or by the Companies Act, 1929, are personal estate, even though the company owns interests in land (Companies Clauses Act, 1845, s. 7; Companies Act, 1929, s. 62.)

Equivalent expressions are "realty", "real estate", "real property". It seems to be clear that these expressions remain technical notwithstanding the legislation of 1925. (L.P.A., 1925, s. 130 (1), s. 205 (1) (xx).) (A.E.A. 1925, s. 3, s. 32, s. 52, s. 55 (1) (xix).) And their importance in Private International Law is well illustrated by a learned Note in the *Journal of Comparative Legislation* for 1936, pp. 289-90. (*Re Cartwright, Cartwright v. Smith*, [1939] Ch. 90; *Re Cutcliffe's Will Trusts, Brewer v. Cutcliffe*, [1940] Ch. 565.)

Things personal

1026. "Things personal" include all "things" not comprised in "things real".

Equivalent expressions are "personalty", "personal estate", "personal property", "chattels". The origin of the distinction between real and personal property was due to the remedy available in early law for the dispossessed owner. It was real if the *res* or thing itself could be specifically recovered in an action known as a real action, i.e. one for the protection of seisin. It was personal, where the remedy was a personal action against the wrongful dispossessor merely giving damages by way of compensation for the loss but not specific recovery; the defendant had the option of either returning

the *res*, or paying its equivalent in money. Realty generally covered freehold estates in land, personalty covered goods, chattels or moveables. Owing to the peculiarities of feudal tenure, leasehold interests in land were never "things real"; but their anomalous position was indicated by the term "chattels real". See *Cheshire, Modern Real Property* 5th Ed. pp. 35-38. A.E.A. 1925, s. 32, s. 33, s. 52, s. 55 (1) (x). Although statutes of the nineteenth and twentieth centuries did much to assimilate the law of real to personal property, the main distinction between them before 1926 was that the beneficial interest in real property devolved on the heir upon the owner's intestacy, whereas personal property, including leaseholds, went to the next of kin. The A.E.A., 1925, s. 45, has, of course, by abolishing the inheritance of real property in all but a few cases, abolished also the chief importance of the classification. But (*semble*) the classification itself has not been abolished, and is too deeply rooted to be disregarded. The distinction remains when a statute or document differentiates between realty and personalty; e.g. wills made by British subjects abroad, Wills Act 1861, secs. 1, 2, 4; and in the construction of testamentary gifts of real and personal property. (*Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268).

1027. "Corporeal hereditaments" include all interests in land which directly confer the right to possession of the land on the person in whom they are vested, and which on an intestacy occurring before 1926 might have devolved upon an heir.

*Corporeal
heredita-
ments*

For the conflict of views, and the unwarranted distinction between corporeal and incorporeal hereditaments, see *Encyclopædia of the Laws of England*, Vol. 3, 3rd Ed., pp. 3-7; *Cheshire, Modern Real Property*, 5th Ed., pp. 100-102. Confusion has arisen because the term hereditament may be used in two senses, (1) the land itself and things forming part of it, such as buildings—the physical substance; (2) the interests enjoyed therein, such as estates, rents, advowsons, etc.—proprietary interests. But proprietary interests are rights of ownership, and whatever the subject matter may be, the interests are incorporeal, for they exist purely in contemplation of law and not in the realm of physical facts. With this caution, corporeal hereditaments include the land itself and those estates and interests therein which prior to 1926 were capable of passing by descent to the heir on an intestacy; they entitle the owner to possession of the land or the receipt of the rents and profits. At Common Law corporeal hereditaments could only be transferred by feoffment with livery of seisin, which was superseded in the seventeenth century by bargain and sale of a lease followed by a deed of release, which avoided actual entry on the land. Incorporeal hereditaments were transferred by deed of

grant. By s. 2 of the Real Property Act, 1845, corporeal hereditaments were deemed to lie in grant as well as in livery. The L.P.A. 1925, s. 51, provides that all lands and interests therein lie in grant and are not capable of being conveyed by livery or livery and seisin or by feoffment, or by bargain and sale. The distinction between corporeal and incorporeal hereditaments as a matter of conveyance is thus abolished. A distinction still remains, for in the L.P.A. 1925, s. 205 (1) (ix), land is defined to include, "land of any tenure and mines and minerals, . . . and other corporeal hereditaments . . . a manor, an advowson, and a rent and other corporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land". This definition is not very helpful, and appears to exclude easements from the group of incorporeal hereditaments (*Re Brotherton, Brotherton v. Brotherton, Re Markham's Settlement* (1907), 97 L.T. 880.) A term of years in possession has been held to be a corporeal hereditament within the meaning of s. 56 of the County Courts Act, 1888. (*Tomkins v. Jones* (1889), 22 Q.B.D. 599.) Lord Kenyon in *Doe v. Allen* (1800), 8 Term Rep. at p. 503 considered the term hereditament as a "description of the thing itself and not of the quality of it, or the interest in it." A freehold estate subject only to a term of years in corporeal, for the possession of the lease does not destroy the seisin of the freeholder. Usage permits the term leasehold hereditament, but as leaseholds did not devolve on the heir, the phrase is somewhat inelegant.

*Incorporeal
hereditaments*

1028. "Incorporeal hereditaments" include all interests in land which do not of themselves confer the right to possession, such as advowsons, rent charges, *profits à prendre*, possibly easements, and peerages, offices, franchises, dignities, and other public rights which are treated as property.

Reversions and future interests are sometimes classified as incorporeal hereditaments, probably because they were always transferable by deed of grant, and might not confer present possession on the owner. It is said that a grant to A for life remainder to B in fee simple, gave B an incorporeal hereditament which became corporeal after A's death. The conveyancing distinction between the two classes of hereditaments has now been abolished, and the absence of present possession seems to be the only reason for classifying future interest as incorporeal, along with the examples given above. Technically this may be correct, but a remainder is of a different nature from an advowson, which like land is the subject of estates or interests whereas a remainder was itself an estate, though now an equitable interest. See *Challis, Law of Real Property*, 3rd Ed. Mr. Sweet's note pp. 48-58.

1029. A "chose" or thing in action means *Chose-in-action* any right, vested in a definite person or persons, and enforceable by legal proceedings, to obtain from another any money or money's worth, or any right in the nature of property, whether the aim of the proceedings be to get possession of a specific material object, or not.

The scope of the phrase "chose-in-action" is at present unsettled, and covers a miscellaneous assortment of rights and properties. The contrast is between a thing recoverable by action, e.g. a debt, and a thing in actual physical possession, the money in one's pocket; unlike a thing in possession it is incapable of physical transfer. It includes all incorporeal interests in personalty unaccompanied by physical possession, whether or not the subject matter is capable of being reduced to physical possession. Certainly the phrase includes claims to specific material objects other than land, rights to enforce the performance of contracts, stocks, shares, annuities, and negotiable instruments; probably also patents, copyrights, and trade marks; probably not claims to compensation in damages for torts or claims to recover land. In consequence of the enactment of the L.P.A., 1925, s. 136, the word "thing", instead of the older equivalent "chose", will probably prevail. It may be used in a special sense for a particular statute, e.g. Bills of Sale Act, 1878, s. 4; Bankruptcy Act, 1914, secs. 38 (c), 167. See *Encyclopædia of the Laws of England*, 3rd Ed. pp. 105-112. (*Colonial Bank v. Whinney* (1885), 30 Ch. D. 261; reversed (1886), 11 App. Cas 426.) (*Torkington v. Magee*, [1902] 2 K.B. 427, 429, 430.) *Law Quarterly Review*, vols. IX 311, X 143, 303, XI 64, 223, 238.

1030. The term "land" includes, in addition to *Land* the soil itself, unworked minerals, the surface, water, trees and other vegetation actually growing in the soil, buildings affixed to the soil, and all articles affixed to the soil, or to any building itself affixed to the soil, in such a manner that they cannot be removed without perceptible disturbance of the soil or building ("fixtures").

The common law rule is expressed in the maxim *Quicquid plantatur solo, solo cedit*. When chattels are affixed by an owner in fee simple he may disannex and dispose of them as he pleases, but if he does not, they devolve on his death with the land. Another common law rule is that whatever becomes part of the land cannot be severed

by a limited owner, *e.g.* a tenant for life or for years, without committing the wrong of waste; but to this rule of irremovability exceptions have been established in respect of ornamental, trade and agricultural fixtures (*Bain v. Brand* (1876), 1 App. Cas. per Lord CAIRNS, L.C., at p. 767). Fixtures may belong to different owners, but they are still part of the land whether the owner has a right to remove them or not. Whether they belong to the landlord or tenant, to the mortgagor or the mortgagee, the heir or the executor, they are fixtures and land, as long as they remain in the place in which they are affixed. The right to remove them does not alter their nature or condition (*Re Walsh, Ex parte King* (1840), 1 Mont. D. & De G. per Sir John CROSS at pp. 123, 124). On the question of removal of fixtures see *Spyer v. Phillipson*, [1931] 2 Ch. 183; *Hulme v. Brigham*, [1943] 1 K.B. 152, *Cheshire op. cit.* pp. 100-105, *infra* §1323. Informal documents, *e.g.* home-made testaments and contracts, often employ the word "land" when they mean an interest in land. The precise scope of the word in such events has usually to be determined by the rest of the document or the circumstances of the case. But in a testament it may be governed by the Wills Act, 1837, s. 26, and, in an Act of Parliament passed after the year 1850, it is subject (unless the Act expressly provides otherwise) to s. 3 of the Interpretation Act, 1889. L.P.A., 1925, s. 205 (1) (ix)—land does not include an undivided share in land.

Servitudes

1031. Easements, profits, franchises, and other similar rights exercised by the owner or occupier of land, as such, are also included in the term "land", and pass on the conveyance of, or succession to, the interest of the owner or occupier, without express words.

L.P.A., 1925, s. 62.

It is doubtful if this rule applies to conveyances made before 1st January, 1882, the date of taking effect of the Conveyancing Act, 1881, s. 6 (1), which first enacted it. The section applies only, if and so far as, a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance. (L.P.A., 1925, s. 62 (4).)

Movables

1032. The extent of the material object included in the description of a movable is a question of fact in each case. No easement, profit, franchise, or similar right can be annexed to or imposed upon the ownership or possession of a movable.

When the doctrine of restrictive covenants was based solely on notice, there was no reason why it should not apply to chattels (*De Mattos v. Gibson* (1858), 4 De G. & J. 276 *per* KNIGHT BRUCE, L. J. at p. 282). Now that the basis of the doctrine is that the plaintiff is enforcing a restriction on the user of the defendant's land for the protection of some existing and defined land of the plaintiff, its application to chattels is very limited. Professor Wade in 44 *L.Q.R.* 1928, p. 51, suggests that while price maintenance agreements on the sale of chattels are not enforceable against subsequent owners (*Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; *McGruther v. Pitcher*, [1904] 2 Ch. 306), yet covenants merely as to user may be (*Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108). But in the case of a patented article, if the subsequent owner knew of the restriction imposed by the patentee by virtue of his statutory monopoly, at the time when he acquired the article, he will be bound by it (*National Phonograph Co. of Australia, Ltd. v. Menck*, [1911] A.C. 336, 350, 353; *Gillette Industries, Ltd. v. Bernstein*, [1942] Ch. 45). This depends not "upon any condition running with or attaching to the article . . . [but] upon the limits of the licence which the patentee had granted when he first parted with the goods", *per* COZENS-HARDY, L.J., in *McGruther v. Pitcher*, *supra* at p. 312. See *post* §1338. *Elphinstone, Covenants affecting Land*, pp. 81-82; *Preston & Newsom, Restrictive Covenants*, pp. 59-61. The scientific classification of proprietary rights into Immovables and Movable is rendered impossible by the survival of the feudal nomenclature alluded to in § 1026 n.

1033. The "profits" of a thing mean the *Profits* pecuniary value which is or may be derived from the occupation, exercise, or enjoyment of the thing.

Dunn v. Large (1783), 3 Doug. (K.B.) 335.

Doe v. Harlow (1838), 12 Ad. & El. 40.

Phillips v. Homfray (1883), 24 Ch. D. 439, at p. 455

1034. A person liable to pay "mesne profits", *Mesne profits* i.e. the profits of a thing accruing during his unlawful occupation, may be ordered to pay, in addition to the occupation value of the premises, the damage (if any) suffered by the lawful claimant by reason of the latter's dispossession;^(a) but he may deduct all sums paid by him which the lawful occupant could have been compelled to pay.^(b)

- (a) *Goodtitle v. Toms* (1770), 3 Wils. 118.
Phillips v. Homfray, *ubi supra*.
- (b) *Doe v. Hare* (1833), 2 Cr. & M. 145.
Barber v. Brown (1856), 1 C.B.(N.S.) 121.

In an action of ejectment by a landlord, mesne profits can only be calculated from the date of the issue of the writ. Rent due before that date should be claimed as such (*Elliott v. Boynton*, [1924] 1 Ch. 236). *Quaere* : if the tenant had repudiated the landlord's title.

SECTION II

INTERESTS IN LAND

TITLE I—GENERAL

1035. Interests in land recognized by English law are either (i) legal interests or (ii) equitable interests. Legal interests are either (a) estates ("corporeal hereditaments") or (b) interests less than estates ("incorporeal hereditaments"). *Interests in land*

"Corporeal hereditaments" were, originally, those interests which carried seisin of the freehold, i.e. possession of the land by a free tenant. As indicated above, § 1027, the term corporeal strictly applies to the land itself, while rights in the land are incorporeal, but according to English legal usage, a right in the land when accompanied by possession is treated as corporeal, while partial rights which do not entitle their owner to possession are treated as incorporeal. By virtue of the doctrine of tenure, each of them was deemed to have been originally created by way of a feudal gift ("feoffment") by a superior ("lord") to an inferior ("tenant"), to hold upon terms of service. This principle of tenure, which still colours the general character of English Land Law, and is the origin of some otherwise inexplicable peculiarities, was, originally, no less a principle of government than of ownership. It was based on the theory that every acre of land in the kingdom was possessed by a tenant who could be held responsible to his lord, and, ultimately, to the Crown, for any services and other liabilities due in respect of it. The Crown was the only owner of land. Consequently, a corporeal hereditament could only be conveyed by notorious transfer or taking of seisin; and the terms "seisin" and "corporeal hereditament" became ultimately, about Littleton's time, co-extensive. Though at first the King's Courts recognized only seisin of a free tenement, i.e. by free tenure, seisin "according to the custom of the manor" came in with the recognition by the King's Courts of the interest of the copyholder in the sixteenth century. But the term "seisin" was never extended to the estate for years; because the latter was at first regarded as a merely contractual or chattel interest. Ultimately, however, though it was still regarded as a chattel interest, the term "estate", and the general doctrine of tenure, were extended also to the term of years, which

now, somewhat inelegantly, ranks as a "corporeal hereditament" though it never descended to heirs, and, not being a freehold, was no the subject of seisin. There were, formerly, several kinds or modes of tenure (knight-service, frank-almoigne, customary or copyhold socage, and leasehold). As a consequence of recent legislation, all have disappeared except (a) socage, applicable to fee simple estates and (b) leasehold, applicable to estates for years. The Statute of Tenures (12 Car. II (1660), c. 24, s. 2, abolished knight-service; L.P.A., 1922, s. 128, abolished copyhold, including "customary" Frank-almoigne (the tenure by which ecclesiastical corporations held some, but by no means all, of their lands) has never been formally abolished; but, the clause in the Act of 1660, which excepted it from the operation of that Act, having been repealed by the A.E.A., 1925, Sched. II, it has become obsolete for no land could be held in frank-almoigne unless it had been continuously held by the same ecclesiastical tenant from a date prior to the Statute *Quia Emptores* 1290, except in the case of a grant by the Crown (*post* 1042). The tenure could only exist between the donor and the donee, and upon alienation of the land, even though to another ecclesiastical corporation, or if by escheat it passed to a superior lord, the tenure was converted into socage.

Estates

1036. The only (legal) estates in land recognized by English law are : (i) estates in fee simple absolute in possession, (ii) estates for terms of years absolute.

L.P.A., 1925, s. 1 (1).

The wording of this important section is not very happy; for there can be no such thing as an "equitable estate". And subs. 4 of s. 1 of the L.P.A., is somewhat inconsistent with subs. 1. in stating that 'legal estates are the estates, interests and charges' which are authorised to subsist at law under the section. Possession includes not only physical possession of the land, but also the receipt of rents and profits of the land, or the right to receive them, if any. (L.P.A., 1925, s. 205 (1) (xix)). A term of years absolute need not be in possession to be a legal estate. See § 1041n for meaning of 'absolute'.

Liabilities of tenant

1037. By virtue of his tenancy, every owner of an estate in possession—

- (i) must, unless he is the tenant of enfranchised land, take the oath of fealty to his lord, if demanded;

By the oath of fealty the tenant undertook to be faithful to his lord and perform the feudal services. In practice, the oath of fealty is

always "respired"; but, *semble*, the liability to take it is the origin of forfeiture by disclaimer (*post*, (iii)). Suit of court was the obligation to attend the lord's court and assist in its deliberations; but the court was practically obsolete before 1926. By a curious oversight there appears to be nothing in the L.P.A., 1922 and subsequent Acts, which expressly abolishes fealty and suit of court in the case of land which was formerly freehold. The copyholder used to render fealty and customary suits; but, with the abolition of copyhold tenure, the oath of fealty and suit of court were abolished in respect of it (L.P.A., 1922, Sched. XII (1) (b)).

- (ii) must render the services reserved at the creation of the estate;

The tenant is liable to be sued for rent service, even though there is no express contract to pay (32 Hen. VIII (1540), c. 37; *Wadham v. Marlow* (1784), 8 East, 315, n.; *Harden v. Hesket* (1859), 4 H. & N. 175), and also for rent reserved in a lease at will, though that is not rent service (Litt. s. 72).

- (iii) must not disclaim (on pain of forfeiture of his tenement) the relation of tenure expressed to be created by the grant of the estate, or subsequently substituted for it;

Doe d. Graves v. Wells (1839), 10 Ad. & El. 427. It would seem by this case that some unequivocal act, e.g. a claim on record, or attorning to a stranger, is required as evidence of the disclaimer.

The provisions of the Conveyancing Act, 1881, s. 14[†] (now incorporated with amendments in the L.P.A., 1925, ss. 146, 147), have no application to forfeiture occasioned by disclaimer.

- (iv) is estopped, so long as he remains in possession of the land, from denying in legal proceedings that his lord had some title to grant the interest which such lord professed to grant ("estoppel by tenure").

Doe d. Nepean v. Budden (1822), 5 B. & Ald. 626.

L. & N.W. Railway Co. v. West (1867), L.R. 2 C.P. 553.

Weeks v. Birch (1893), 69 L.T. 759.

But a tenant who admits the grant may show that the lord's interest has since expired ("No estoppel where an interest passes"). The former liability of the heir, on succession to his ancestor's estate, to pay a relief to his lord, has disappeared with the abolition of succession by inheritance (*post*, Book V, Section II, Title I). And the former liability to reliefs and fines on alienation, which still attached to land

formerly held by copyhold tenure (L.P.A., 1922, s. 128 (2) (b)), was abolished by s. 138 of that Act, from 31st December, 1935. It would appear, today, that the matters mentioned in (i)-(iv) above would only arise between the reversioner and his tenant for a term of years.

*Incidents of
reversion*

1038. By virtue of his reversion, every owner of an estate in possession out of which a smaller estate has been created—

- (i) may distrain, in manner permitted or provided by law, for all rent service due from the tenant of such smaller estate in respect thereof ;

Litt. s. 226. A lessor at will may also distrain for a yearly rent, though such rent is not rent service (Litt. s. 72 ; Co. Litt. 57 b).

Presumably, the reversioner cannot distrain unless the tenant is or has been in possession of the land ; e.g. the creator of a term of years in expectancy cannot distrain until the expectancy has taken effect in possession. The right to distrain, since 1925, apparently, can only apply to a reversioner on a term of years. For where A, the owner in fee simple, grants to B for life or to C in tail, B and C, if of full age, are entitled to have the legal estate in fee simple vested in them on trust for themselves for their respective equitable interests and then on trust for A in fee simple. (S.L.A., 1925, ss. 4, 16.)

- (ii) is estopped, in like manner as his tenant, so long as he claims his reversionary estate, from denying in legal proceedings that he, or his predecessor in title, had some right to grant the estate which he professed to grant ("estoppel by tenure").

Canterbury Corpn. v. Cooper (1908), 99 L.T. 612. This case, however, shows that the doctrine of estoppel cannot be employed to validate a lease void by statute.

Merger

1039. Whenever an estate in land is vested in any person and is immediately followed by a larger estate in the same land, and the two estates become vested ^(a) in the same person in the same right, ^(b) the smaller estate is absorbed in the larger ("merger") ; ^(c) unless it was the intention of the person conveying or

acquiring either of them that their separate existence should be maintained, or unless it is for the advantage of the person in whom the estates are vested that they should continue to exist separately.^(d)

- (a) If one is vested and the other contingent, there is no merger (*Stafford's (Lord) Case* (1609), 8 Co. Rep. 73 a).
- (b) *Jones v. Davies* (1861), 7 H. & N. 507. In this case some little doubt was expressed by the Court as to whether interests in different rights did not merge at law, if the merger was brought about by the acts of the parties. But, since the passing of the Judicature Act, 1873, s. 25 (*post*), this question has had only an historical interest.
- (c) *Re Radcliffe, Radcliffe v. Bewes*, [1892] 1 Ch. 227.

A longer term may even merge in a shorter; if the latter is expectant in reversion upon the former, and both become vested in the same person (*Stephens v. Bridges* (1821), 6 Madd. 66).

- (d) L.P.A., 1925, s. 185. This section replaces the Judicature Act, 1873, s. 25 (4), and is a summary of the law as settled by Equity tribunals before the passing of the Judicature Act, 1873.

A.-G. v. Kerr (1840), 2 Beav. 420, where a lease was held to survive, though the fee had been vested in the lessee for (apparently) half a century.

Ingle v. Vaughan Jenkins, [1900] 2 Ch. at p. 370.

Capital and Counties Bank, Ltd. v. Rhodes, [1903] 1 Ch. at p. 652.

Lea v. Thursby, [1904] 2 Ch. 57.

The doctrine of merger applies also to (a) coalescence of the legal estate and the corresponding equitable interest in the same land (*Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327; *Re Selous*, [1901] 1 Ch. 921); (b) coalescence of a charge and the estate on which it is charged (*Re French-Brewster's Settlements, Walters v. French-Brewster*, [1904] 1 Ch. 713; *Re Hole, Davies v. Witts*, [1906] 1 Ch. 673; *Re Gibbon, Moore v. Gibbon*, [1909] 1 Ch. 367; *Butler v. Rice*, [1910] 2 Ch. 277); (c) coalescence of a higher with a lower obligation (*ante*, § 304), extinguishment of a "satisfied" term of years (L.P.A., 1925, s. 5, where the term "merger" is actually used. There is no coalescence of an entailed interest or a base fee with the interests immediately expectant thereon (*Stafford's (Lord) Case* (1609), 8 Co. Rep. at 75 a; Fines and Recoveries Act, 1833, s. 39—a base fee when united with the immediate remainder or reversion in fee is enlarged instead of being merged; *Re Dunsany's Settlement, Nott v. Dunsany*, [1906] 1 Ch. at p. 582). It was argued in *Playford v. Hoare* (1829), 3 Y. & J. at p. 180, by Mr. Preston, of counsel for the successful defendant, that an estate for life executed by the Statute of Uses would never merge in a remainder at the common law. *Sed quaere*. For the effect of the merger of a middle term of years, leaving the sub-term intact, see *post*, § 1081.

*Legal
interests less
than estates*

1040. The only legal interests in land less than estates recognized by English Law are (i) rights or privileges in or over land held in perpetuity in possession or for a term of years absolute, easements, and offices ("hereditaments purely incorporeal"), (ii) rent charges in possession issuing out of or charged on land for similar durations, (iii) charges by way of legal mortgage, (iv) land tax, tithe rent-charge,^(a) and any other similar charge on land not created by instrument, (v) rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rent-charge.

L.P.A., 1925, s. 1 (2).

(a) Tithe rent-charge has been abolished as from the 2nd October 1936 (Tithe Act, 1936, s. 1). It was a rentcharge imposed by statute in lieu of the former right of parsons and others to one-tenth of the produce of land. Land formerly burdened with it is now subject to a tithe redemption annuity payable to His Majesty for sixty years (*ibid.* s. 3) and although it is not expressly stated to be a legal interest, it clearly falls within that category.

Semble : "franchises" are included in the "privileges" referred to under (i) above.

TITLE II—ESTATES IN FEE SIMPLE ABSOLUTE

1041. An estate in fee simple absolute is an estate *Fee simple* in perpetuity which before 1926 was descendible (subject to the Land Transfer Act, 1897, s. 1^(a)) to heirs general of any degree, lineal or collateral, in due order of inheritance,^(b) including a fee simple subject to a legal or equitable right of entry or re-entry.^(c)

(a) Which caused the real estate of a deceased person to devolve on his personal representative for purposes of administration.

(b) Co. Litt. 1 b.

At the common law, the estate was descendible to the heirs of the person last seised. By the Inheritance Act, 1833, s. 2, the estate, on intestacy occurring since 31st December 1833, descended, in the first instance, to the heirs of the "purchaser" (i.e. the person who last acquired the estate otherwise than by inheritance; the L.P. (Am.) A., 1859, s. 19, provided that on a total failure of the heirs of the last purchaser, descent could be traced from the last person entitled. There was no restriction of remoteness. Such an estate is, obviously, capable of enduring indefinitely. The provisions of the Land Transfer Act, 1897, s. 1, *ubi supra*, had no application to the beneficial interest in the land (*ibid.* s. 2 (2)); but descent to "heirs" was, with rare exceptions, abolished by the A.E.A., 1925, § 2037, note. There appears to be no statutory definition of a fee simple. It means an estate which will continue for ever, and which will not be shifted from the present holder otherwise than by some divestitive act on his part, or by operation of law, e.g. by death, bankruptcy, or on the part of some overriding authority, such as an Order of the Ministry of Agriculture, or an Act of Parliament. The word absolute is used to distinguish it from, (1) a determinable fee, e.g. to A and his heirs tenants of the manor of Dale. Here, A and his heirs have a fee simple which will end automatically as soon as they cease to be tenants of that manor. (2) A fee simple subject to a gift over in favour of another, e.g. to A and his heirs, but if B marries C to B and his heirs. (3) A fee simple defeasible by condition subsequent e.g. to D and his heirs on condition that he never sells it to E—but this is subject to the L.P. (Am.) A., 1926. Prior to 1926 it might end by escheat to the lord (usually the Crown) on the death of the owner intestate without heirs. Escheat has been abolished, but the Crown takes as *bona vacantia* if the deceased left no will and no relatives entitled

under the A.E.A., 1925, secs. 45, 46. In effect, it means that the estate goes to the Crown on the owner's death intestate without leaving him surviving a relative who is a descendant of one of the grandparents of the deceased. It may also end under the L.P.A., s. 153 (a prior long lessee enlarging his estate (*infra* § 1091); the Fines and Recoveries Act, 1833 (a prior tenant in tail barring his entail), and under the Limitation Act, 1939 (twelve years adverse possession by a squatter). The L.P.A., 1925, s. 7, provides that a fee simple is absolute although liable to be divested by virtue of the Land Clauses Acts, the School Sites Acts (*Re Cawston's Conveyance, Hassard-Short v. Cawston*, [1940] Ch. 27) or any similar statute, and although held by a corporation and liable to determine by dissolution of the corporation (*Hastings Corp. v. Letton*, [1908] 1 K.B. 378 at p. 384, Companies Act, 1929, s. 296).

- (c) L.P.(Am.)A., 1926, s. 7, and Sched. This clause was added to cover the case where a vendor had sold his fee simple to a purchaser for a perpetual rent charge (an annual sum charged on the land) instead of a cash payment. The remedies for non-payment of the rent charge carried a right to re-enter and resume ownership until the arrears were paid. It is clear now that the purchaser's fee simple is absolute. *Quaere* whether the L.P.(Am.)A., 1926 makes every fee simple liable to determination by the happening of a condition subsequent an absolute, and, therefore, a legal fee simple.

It may be added that an absolute fee simple, in order to be legal, must be in possession. This includes not only physical possession of the land, but also the receipt of rents and profits or the right to receive the same, if any, so that if the owner of a fee simple absolute grants a lease, his estate is still in possession. But a fee simple cannot be in possession if it is subject to a prior interest of freehold. A temporary though curious exception to the L.P.A., 1925, s. 1, occurs in the Welsh Church (Burial Grounds) Act, 1945, s. 1, which provides, in certain cases, that the incumbent will have a legal estate in the burial ground during his incumbency and the Representative Body a legal estate in remainder.

*Cannot be
created by
subject*

1042. No new estate in fee simple can be created otherwise than by the Crown.^(a)

- (a) 18 Edw. I (1290), c. 1 (*Quia Emptores*), which does not bind the Crown. This enactment, despite its ancient date and technical character, has important practical consequences at the present day. It appears to have been totally unaffected by subsequent legislation. It provided that no alienation of a fee simple by a subject after 1290 could create the relationship of lord and tenant between the alienor and the alienee, the latter would hold of the alienor's lord. With the lapse of time and the fall in the value of money, evidence of existing mesne lordships disappeared, so that nearly all land came to be held direct of the Crown.

A possible exception to the rule that a new fee simple could only be created by the Crown before 1926, was the enfranchisement of a copyhold tenement. It is, of course, possible to argue that, in this operation, no new fee simple is created; and that the estate of the lord or reversioner is merely transferred to the tenant. But, in that case, incumbrances affecting the former would, *semble*, attach to the estate of the transferee, which can hardly have been intended. And, moreover, the doctrine of the text is supported by judicial authority (*Lord Lilford v. A.-G.* (1867), L.R. 2 H.L. at p. 70, *per* Lord CHELMSFORD, C.; *Re Trevanion, Trevanion v. Lennox*, [1910] 2 Ch. 538). Owing to the recent disappearance of copyhold tenure, the question is now of purely academic interest.

1043. An estate in fee simple may be transferred to an individual or individuals, in an assurance by deed, by the use of the words "and his heirs" after the name of the transferee,^(a) or by a limitation to the heirs of a named person,^(b) or, in the case of deeds, executed after 31st December 1881, by a limitation to the transferee "in fee simple",^(c) or, in a conveyance by deed of "freehold land" executed after 1925, without any words of limitation unless a contrary intention appears in the conveyance.^(d) In a testamentary disposition, any words signifying the testator's intention to devise such an estate will suffice, in point of form, to do so;^(e) and, where there is a devise of real estate without words of limitation, such devise will be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by testament in such real estate, unless a contrary intention appears by the testament.^(e)

Words of limitation

(a) Litt. s. 1.

(b) Inheritance Act, 1833, s. 4.

(c) L.P.A., 1925, s. 60 (4) (a). (The alternative expression allowed by the Act is technical, and must be strictly followed (*Re Ethel and Mitchell's and Butlers' Contract*, [1901] 1 Ch. 945). Technical words were absolutely essential to create a legal fee simple in a deed prior to 1926, but informed words shewing a clear intention were adequate to create an equitable fee simple in a deed, e.g. absolutely (*Re Arden, Short v. Camm*, [1935] Ch. 326). Where strict conveyancing language was used, the construction was the

same as that of a legal estate, and in the absence of proper technical words, only a life estate passed. This applied even if a general intention to pass a fee simple could be gathered from the instrument. (*Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469), but in this case, if the court was asked to rectify the instrument, and not merely construe it, the grantor's intention would be carried out by inserting the necessary words of limitation (*Banks v. Ripley*, [1940] Ch. 719).

- (d) L.P.A., 1925, s. 60 (1). In practice, the words "in fee simple" are invariably inserted to make the intention clear.
- (e) *Mannox v. Greener* (1872), L.R. 14 Eq. 456.
Crumpe v. Grumpe, [1900] A.C. 127.
- (f) Wills Act, 1837, s. 28. The statute only applies to wills executed, revived, or republished after 31st December 1837. In wills of an earlier date, it was necessary, in order to pass a fee simple, to use some expression showing the testator's intention to devise his whole estate (*Gatenby v. Morgan* (1876), 1 Q.B.D. 685). The legislation of 1925 appears to have left this section of the Wills Act unaffected.

*Gifts to
corporation*

1044. In an assurance by deed to a corporation whether aggregate or sole,^(a) no special words are necessary to transfer a fee simple; except that, in an assurance by deed executed before 1926, to a corporation sole, the words "and his successors" are necessary and sufficient to convey a fee simple.^(b) *Semble*: in a devise to a corporation sole, the presumption is the same as in the case of a devise to an individual (*ante*, § 1043).^(c)

- (a) L.P.A., 1925, s. 60 (2).
- (b) Co. Litt. 8 b, 94 b.

Ex parte Castle Bytham (Vicar), Ex parte Midland Railway Co., [1895] 1 Ch. 348. But it is said that a gift "in frank-almoigne", or "in free alms", to a religious corporation sole, passed a fee simple without the word "successors". It is the better opinion, that s. 51 of the Conveyancing Act, 1881, had no application to conveyances to corporations. There is an attempt to cure the difficulties to which this rule gives rise in the L.P.A., 1925, s. 180 (1); but it is not very happy.

- (c) Wills Act, 1837, s. 28. The words of the section are "devised to any person"; and there is no definition of "person" in the Act. (See Interpretation Act, 1889, s. 19, which, however, does not apply to the Wills Act, 1837.) Of course, assurances of land to corporations are subject to the Rule against Mortmain (*ante*, § 27).

*Contract of
sale*

1045. Where one person contracts to sell land to another, the vendor is, in the absence of expressions

or other circumstances to the contrary, bound to convey an estate in fee simple. (*Ante*, § 376 (ii).)

Hughes v. Parker (1841), 8 M. & W. 244.

Kitchen v. Palmer (1877), 46 L.J. (Ch.) 611.

The L.P.A., 1925, s. 42, makes void certain stipulations in contracts for the sale of a legal estate in land, (1) that the conveyance shall be made with the concurrence of equitable owners where title can be made free from the equitable interest in some other way, (2) that the purchaser shall pay the costs of a vesting order, or appointment of trustees &c., (3) that he shall pay for getting in the legal estate, (4) that he shall take subject to registered charges though he has bought free from them, (5) that he shall not employ his own solicitor, (6) that he shall not object to unstamped documents.

1046. A person who is in possession of land is presumed, unless the contrary appears, to be seised in fee simple of the land. *Presum
of seisi
in fee*

Wallwyn v. Lee (1803), 9 Ves. at p. 31, *per* Lord ELDON, C.

Peaceable d. Uncle v. Watson (1811), 4 Taunt. 16.

Doe d. Graham v. Penfold (1838) 8 C. & P. 536.

Busher v. Thompson (1846), 4 C.B. at p. 59, *per* COLTMAN, J.

Asher v. Whitlock (1865), L.R. 1 Q.B. at p. 6, *per* MELLOR, J.

1047. Subject to restrictions imposed by Acts of Parliament (e.g. Town and Country Planning Acts), to his liabilities towards the public and towards his neighbours (*post*, Section II), and to any liabilities by covenant or agreement undertaken by himself or his predecessors in title, and binding on him at law or in equity, and to any franchises, easements, or profits (*post*, Title VI) affecting the land, the tenant in fee simple absolute in possession is entitled to treat the land, and everything therein and thereon, in any manner that he pleases. *Rights
tenant
fee sim.*

There is, probably, no definite statutory or judicial authority for this proposition. But it is implied in almost every case dealing with a fee simple (see, for example, *Turner v. Wright* (1860), 2 De G. F. & J. 234). There is an increasing number of statutes imposing restrictions and liabilities on landowners in the public interest—Town and Country Planning Acts.

1048. Subject to the law relating to trusts and *Aliena
of fee.*

mortgages, the owner of an estate in fee simple absolute may transfer his estate, or may create out of it any smaller estate or interest recognized by law in the land.^(a) Any condition subsequent, covenant, proviso, or limitation providing for the cesser or forfeiture of an estate in fee simple absolute upon alienation generally, whether voluntary or involuntary,^(b) and whether within a limited period or indefinitely,^(c) is void.^(d) But an estate in fee simple absolute may (*semble*) be made alienable only to members of a limited class.^(e)

(a) 18 Edw. I (1290) c. 1 (*Quia Emptores*). The second power is a consequence of the general principle of tenure (*ante*, § 1035, n.). It is difficult to find any express authority for it; but it is the basis of ordinary practice.

(b) *Re Machu* (1882), 21 Ch. D. 838.

Re Smith, Smith v. Smith, [1916] 1 Ch. 369.

(c) *Re Rosher, Rosher v. Rosher* (1884), 26 Ch. D. 801.

Re Cockerell, Mackaness v. Percival, [1929] 2 Ch. 131.

(d) Litt. s. 360.

Re Dugdale, Dugdale v. Dugdale (1888), 38 Ch. D. 176.

Corbett v. Corbett (1888), 13 P.D. 136; *affirmed*, 14 P.D. 7.

(e) *Re Macleay* (1875), L.R. 20 Eq. 186. (But this decision was severely criticized by PEARSON, J., in *Re Rosher, ubi supra*.)

Re Dugdale, Dugdale v. Dugdale, ubi supra, at p. 179, *per* KAY, J.

It is a little doubtful whether the rule laid down by this section might not be evaded by a skilful use of a conditional limitation, e.g. "to A and his heirs to hold until" (the prohibited event happens), though the interest thus conveyed would be equitable only. See expressions of CHITTY, J., in *Re Machu, ubi supra*, at p. 842, and of KAY, J., in *Re Dugdale, Dugdale v. Dugdale, ubi supra*, at p. 181. An equitable fee simple so limited has, in fact, been recognised, though without serious discussion (*Re Leach, Leach v. Leach*, [1912] 2 Ch. 422); and the language of s. 146 (7) of the L.P.A., 1925, which avoids leases framed in a similar way, suggests an affirmative answer.

*Attempted
limitation
over*

1049. Any attempt on the part of a transferor of an estate in fee simple absolute to arrange for the disposal of the estate after the death of the transferee, in the event of the latter not having disposed of it in his lifetime, is void.

Gulliver v. Vaux (1746), 8 De G. M. & G. 167, n.

Holmes v. Godson (1856), 8 De G. M. & G. 152.

Re Dixon, Dixon v. Charlesworth, [1903] 2 Ch. 458.

Re Hanbury, Hanbury v. Fisher, [1904] 1 Ch. 415.

Re Crutchley, Kidson v. Marsden, [1912] 2 Ch. 335.

Such provision would, in effect, be an attempt to make a testament for the transferee. See, however, *Comiskey v. Bowring-Hanbury*, [1905] A.C. 84.

1050. A fee simple may be determinable by any words restricting its duration to an uncertain period which may come to an end by the happening of a contingency other than the failure of the heirs or next-of-kin of the person to whom the fee simple is limited.^(a) The owner of a fee simple determinable has the same rights as the owner of an ordinary estate in fee simple absolute; except that his estate will terminate, *ipso facto*, on the happening of the contingency which puts an end to the period for which it was limited.^(b)

(a) *Case of I. S.* (1585), 1 Leon. 33.

Poole v. Nedham (1608), Yelv., 149.

Seymour's Case (1612), 10 Co. Rep. at p. 97 b.

Liford's Case (1614), 11 Co. Rep. 49 a.

Ayres v. Falkland (1697), 1 Ld. Raym. 326, *per Curiam*.

Bagshaw v. Spencer (1748), 1 Ves. Sen. 142.

(b) *Portington's Case* (1613), 10 Co. Rep. at p. 42 a.

This last is the essential distinction between a fee simple determinable and a fee simple absolute to which a condition subsequent is annexed. The latter interest is not determined until the breach of condition is enforced by entry. For the appropriate words for each kind of limitation, see COKE's remarks in the decision last quoted. There is considerable dispute as to the proper legal description of the determinable fees simple which are the subject of this section; but the expression would seem to be conveniently applicable to all fees which are liable to expire by the happening of any external contingency. The most common example of such fees is that conveyed by the limitation contained in a strict settlement to the settlor in fee simple until the celebration of the intended marriage. But a fee simple or other legal estate may also determine by the dissolution of a corporation in which it is vested. The Court in such a case may vest a corresponding estate in the person who would have been entitled to the determined estate had it remained subsisting (L.P.A., 1925, s. 181). See *Cheshire, Modern Real Property*, pp. 515-534; *Megarry, Manual of Real Property*, pp. 51-55.

*Intermittent
fee simple*

1051. A fee simple cannot (otherwise than by Act of Parliament) be limited to take effect intermittently, i.e. to revive after it has once determined ("desultory limitation").

Co. Litt. 27 a, and Hale's note.

Corbet's Case, Corbet v. Corbet (1600), 1 Co. Rep. at p. 87.

Prince's Case, The (1606), 8 Co. Rep. at p. 17 a.

The well-known exception of the Duchy of Cornwall is limited under the express provisions of an Act of Parliament.

TITLE III—ESTATES FOR TERMS OF YEARS ABSOLUTE

1052. A term of years absolute is created by a limitation ("lease") of land, by a person having an interest therein (the "lessor" or "landlord") to any other person (the "lessee" or "tenant"), to hold for any certain period;^(a) such period being less than that of the lessor. No entry upon the land by the tenant is necessary to vest the estate in him.^(b)

(a) L.P.A., 1925, s. 205 (1) (xxvii). It may take effect either in possession or in reversion, whether or not at a rent, with or without impeachment for waste, subject or not to another legal estate.

Litt. s. 58.

Say v. Smith (1563), 1 Plowd. at p. 272.

Bishop of Bath's Case (1605), 6 Co. Rep. 34 b.

Sheppard, Touchstone, p. 267.

The classification of terms of years is not very clear; and, in dealing with it, it is difficult to avoid a cross division. Although the interest of the lessee for years was not completely protected until the passing of the statute of 1529 (21 Hen. VIII, c. 15), it is clear that by Littleton's day it was regarded as an estate, subject at least to some of the incidents of tenure (Litt. s. 132). But the influence of its originally contractual character (§ 1035, n.) has always prevented it being classed, technically, as real property, and, therefore, as capable of seisin. Consequently, it was not a suitable subject for the normal common law conveyance, viz. feoffment with livery of seisin; and, until the passing of the Statute of Frauds in 1677 (s. 4), no formalities were required for the creation or transfer of a term of years. Meanwhile, the passing of the Statute of Uses had paved the way for the creation of estates for years without entry; the most important instance of which was the lease on which the Conveyance by Lease and Release was founded. But, inasmuch as neither the common law nor the Statute of Uses required the employment of any special words for the limitation of a term of years (*Heyward's Case* (1595), 2 Co. Rep. 35 a; *Fox's Case* (1610), 8 Co. Rep. 93 b; *Duxbury v. Sandiford* (1898), 80 L.T. 552, C.A.), and inasmuch as it was decided in *Barker v. Keat* (1677), 2 Mod. Rep. 249, that a merely nominal consideration was sufficient to raise a use for the purpose, it was sometimes extremely difficult to tell whether a lease operated at common law or under the statute. A more practical classification of estates for years is to be found in the objects for which they are created, i.e.

*Esta.
term
absoi*

whether for occupation purposes or by way of security for money. It is clearly assumed in Littleton's well-known passages (e.g. ss. 58, 59, 66, 67), and in Coke's commentary thereupon, that the lessee for years is an occupier. But a practice, said by Barton (*Modern Precedents*, V, 133) to date from the reign of Elizabeth, grew up of effecting a mortgage of freeholds by granting a long term to a mortgagee at a nominal rent; probably to prevent claims of dower by the mortgagee's widow (*Nash v. Preston* (1630) Cro. Car. 190), possibly also to avoid the inconvenience of having the estate and the right to receive the mortgage money vested in different persons. This practice persisted until the beginning of the nineteenth century (Barton, *op. cit.* vol. v, *Precedents*), but is stated by Davidson in 1869 (*Precedents*, vol. ii, pt. ii, p. 1008, n. (a)) to have been then almost abandoned. Again, the long terms invented by the Caroline conveyancers, under the system of strict settlements, were for the purpose of securing jointures and portions; but they were generally made by way of use (Bridgman, *Conveyances*, pp. 225, 259, 260, 332, etc.). Finally, the familiar practice of effecting mortgages by the process of demise or sub-demise renders it impossible to identify the common law term with the occupation lease, and the term by way of use with the mortgage.

- (b) L.P.A., 1925, s. 149. This abolishes the common law doctrine of *interesse termini*, retrospectively. Before 1926 unless a lease was granted by bargain and sale or under the Statute of Uses, the lessee acquired no actual estate in the land until he had taken possession during the term of the lease. Until entry, he had an *interesse termini*, a legal proprietary right enforceable against the lessor and third parties; it was not an estate; no reversion could exist on it so there could be no release of the grantor's interest to the holder of an *interesse termini* (*Lewis v. Baker*, [1905] 1 Ch. 46; *Gillard v. Cheshire Lines Committee* (1884), 32 W.R. 943). All terms of years absolute since 1925 whether created before or after the Act are capable of taking effect, according to the estate, interest, or powers of the grantor, from the date fixed for the commencement of the term, without actual entry (*ibid.* (2)).

*Terms by
way of use*

1053. Terms of years which, before 1926, were capable of being created by way of use as legal interests, may now be created (but only as equitable interests) by way of trust, notwithstanding the repeal of the Statute of Uses.

L.P.A., 1925, ss. 1 (9), 4 (1), Sched. VII.

Though it was rare that such terms were created for purposes of genuine occupation before 1926, they were, as we have seen, frequently created as a method of effecting mortgages or successive limitations in settlements ("executory interests"); and they raised substantial as well as technical difficulties, e.g. as to necessity for entry on the land

by the termor and the methods of getting rid of them after their purposes had been fulfilled. These will be treated of in their proper places.

1054. For the purposes of § 1052, a term of years may be "absolute", though it is made liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event other than the dropping of a life or the determination of a determinable life interest. *Liability terminates*

L.P.A., 1925, s. 205 (1) (xxvii). A term for a life or lives, or for years determinable with life or lives, or on the marriage of the lessee can only exist in equity. Where such a lease, granted at a rent or in consideration of a fine existed when the Act came into operation, or is purported to be created afterwards, it takes effect as a lease for ninety years determinable by the lessor or lessee or their successors in title by at least one month's notice in writing, given after the expiration of the life or lives or the marriage of the lessee. (L.P.A., 1925, s. 149 (6).)

1055. For the purposes of § 1052, a tenant holding from year to year (*post*, § 1064), or for a term less than a year, or for a year or years and a fraction of a year, is deemed to hold for a term of years. *Short tenancy*

L.P.A., 1925, s. 205 (1) (xxvii).

1056. Where, under the L.P.A., 1925, a lease is required to take effect in possession within twenty-one years after its creation, such lease will not create a "term of years absolute" unless it is expressed so to take effect. *Future lease*

Ibid.

This provision does not apply to leases created before 1926. A lease at a rent or in consideration of a fine to take effect in possession more than twenty-one years after its creation, is void and a contract made after 1925 to create such a term is void; but this does not apply to a term taking effect in equity under a settlement, e.g. portion terms. (L.P.A., 1925, s. 149 (3).) A legal term, whether or not being a mortgage term may be created to take effect in reversion expectant on a longer term (*ibid.* s. 149 (5)). Successive sub-terms, created out of a head term, being in each case one day shorter than the head term, take effect at law, and the second sub-term creates a reversion on the first sub-term, though of equal duration.

*Reversionary
lease*

1057. Where a lessor creates a term of years to take effect immediately on the expiry of an existing estate for years,^(a) he nevertheless retains the reversion upon the earlier term, and will be entitled to enter on the land on the expiry of such earlier term.^(b)

(a) L.P.A., 1925, s. 149 (5).

(b) *Joyner v. Weeks*, [1891] 2 Q.B. at p. 47, *per* FRY, L. J.
Re Moore and Hulm's Contract, [1912] 2 Ch. 105.

Care must be taken to distinguish between this case and that of a lease of the reversion upon the first term. In such a case (e.g. *Colebourn's & Mixtone's Case* (1588), 1 Leon. 129, as corrected in *Rawlings' (Doe d.) v. Walker* (1826), 5 B. & C. at p. 123), the lessor will have lost his right to distrain for the rent reserved by the first lease. In other words, a reversionary lease and a lease of a reversion are two different things:

*Limits of
term*

1058. Every lease must have a certain beginning and a certain ending, but it is sufficient if the commencement is ascertained with certainty when the lease is to take effect in possession. The duration must be either fixed by specifying the number of years in the first instance,^(a) or by reference to a collateral matter which must either itself be certain or capable before the lease takes effect of being rendered certain.^(b) It is sufficient that the maximum duration of the term is fixed, though the lease may be determined within the period.

- (a) *Lace v. Chantler*, [1944] K.B. 368, *per* Lord GREENE, M.R. at pp. 370-371. Held that a tenancy granted during war-time, "for the duration of the war", does not create a good leasehold interest, the term, when the agreement takes effect, being uncertain, and on the facts it was impossible to construe it as a lease for ninety-nine years, determinable on the cessation of the war. To remedy this, the Validation of War-Time Leases Act, 1944, converted tenancies for the duration of the war or emergency, into valid tenancies for ten years determinable after the war or emergency, by (usually) one month's notice in writing. The end of the war in Europe was May 9, 1945 (S.R.O. 1945 No. 703 L.8) and the war with Japan August 15, 1945 (S.R.O. 1945 No. 1006 L.18). The provisions of the Act are complicated. See *Hill and Redman, Landlord and Tenant*, 10th Ed. pp. 1039-1045. *Bishop of Bath's Case* (1605), 6 Co. Rep. 34 b—a term from a fixed

date for as many years as A shall name, but this must be done in the lifetime of the lessor, and before the lease takes effect.

Kirsley v. Duck (1712), 2 Vern. 684.

1059. When the time of its commencement is not specified in the lease, or when the lease is expressed to take effect from the making thereof, or "from henceforth", the term is deemed to begin on the delivery of the lease.^(a) But when the term is expressed to commence "from" the day of the date or making of the lease,^(b) or "from" a fixed calendar date,^(c) it will begin on the day following such delivery or date respectively; unless it is necessary, to render the lease effectual, that the term should begin immediately or on the specified date.^(d)

*Commence
ment of ter*

(a) Co. Litt. 46 b.

Goddard's Case (1584), 2 Co. Rep. 4 b.

Clayton's Case (1585), 5 Co. Rep. 1 a.

Osborn v. Rider (1606), Cro. Jac. 135.

Llewelyn v. Williams (1610), Cro. Jac. 258.

Hatter v. Ash (1696), 1 Ld. Raym. 84.

Doe d. Phillip v. Benjamin (1839), 9 Ad. & El. 644.

Where in a contract for a lease no date is mentioned, there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion, and failing this it is void for uncertainty (*Marshall v. Berridge* (1881), 19 Ch. D. 233). But a contract for a lease is enforceable, though the commencement of the term refers to a contingency which at the time of the contract is uncertain, provided the contingency has occurred at the time when the contract is sought to be enforced. (*Brilliant v. Michaels*, [1945] 1 All E.R. 121.) Where the tenant enters under an agreement, not under seal, which does not specify the commencement of the term, it will usually commence from the entry (*Doe d. Cornwall v. Matthews* (1851), 11 C.B. 675), but parol evidence is admissible to show when the instrument was intended to take effect. (*Davis v. Jones* (1856), 17 C.B. 625.)

(b) *Clayton's Case*, *ubi supra*.

Barwick's Case (1598), 5 Co. Rep. 93 b.

Anon. (1611), 1 Bulstr. at p. 177, *per* FLEMMING, C.J.

Cornish v. Cawry (1648), Aleyn, 75.

Styles v. Wardle (1825) 4 B. & C. 908.

But see *Bacon v. Waller* (1616), 3 Bulstr. 203.

(c) *Anon.* (1773), Lofft, 275.

Ackland v. Lutley (1839), 9 Ad. & El. 879.

When the term is to begin "on" a fixed calendar date that day is included. But the deed must be interpreted so as to give effect to the substantial rights of the parties and for practical purposes this distinction can usually be neglected (*Sidebotham v. Holland*, [1895] 1 Q.B. 378).

(d) *Pugh v. Leeds (Duke)* (1777), 2 Cowp. 714.

Contingent
terms

1060. Subject to § 1056, the fact that a term of years is to commence on the happening of a contingency, does not prevent it being a certain period within the meaning of § 1052.

Co. Litt. 45 b.

Sheppard, *Touchstone*, 274, 284.

Goodright d. Hall v. Richardson (1789), 3 Term Rep. 462.

A lease will be determinable without an express proviso for re-entry, if the event specified in a condition subject to which the term was created, happens. (*Pennant's Case*, *Harvey d. Pennant v. Oswald* (1596), 3 Co. Rep. at p. 65; *Sexton d. Freeman v. Boyle* (1788), Vern. & Scr. 402, 412; *Doe d. Henniker v. Watt* (1828), 8 B. & C. 308, 315.) Where the term is limited "until" the happening of an event, it comes to an end on the event happening (*Doe d. Lockwood v. Clarke* (1807), 8 East, 185). But, where a term is granted "if the lessee shall so long live", it does not create a "term of years absolute". It would, if otherwise valid, and granted at a rent or in consideration of a fine create a term of ninety years, determinable on one month's notice after the contingency had happened (L.P.A., 1925, s. 149 (6)).

Form of
lease

1061. An estate for years may be created by any form of words from which it can be gathered that a person having an interest in land agrees that another shall have exclusive possession of such land for a certain period.^(a) But a mere licence to use land for a definite purpose, though for a certain period and at a fixed rent, does not create an estate for years, even though followed by entry.^(b)

(a) *Tisdall v. Essex* (1616), 3 Bulst. 204.

Sheppard, *Touchstone*, 271-2.

Duxbury v. Sandiford (1898), 80 L.T. 552, C.A.

(b) *Watkins v. Milton-Nex-Gravesend Overseers* (1868), L.R. 3 Q.B. 350.

It is difficult to formulate the distinction between leases and other interests; cf. *Rendell v. Roman* (1893), 9 T.L.R. 192 and *Joel v. International Circus and Christmas Fair* (1920), 124 L.T. 459. The

precise words used are not decisive, regard must be had to the substance of the agreement (*Taylor v. Caldwell* (1863), 3 B. & S. 826, 832). Perhaps the best definition of a lease is an interest in land under which the holder has the right to exclusive occupation of a defined area : see *Glenwood Lumber Co., Ltd. v. Phillips*, [1904] A.C. 405 and *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344. If the contract is merely for the use of property in a certain way and on certain terms while it remains in the possession and control of the owner, it is a licence. There may be a transfer of an interest in land without a right to exclusive occupation (*Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440), and a right to the exclusive occupation of a defined area of land without the transfer of an interest in land (*Smith v. St. Michael, Cambridge, Overseers* (1860), 3 E. & E. 383). A person who takes rooms in another's house may be a lodger (a licensee for valuable consideration) or a tenant. The following considerations are material but not decisive : (1) Does the "landlord" reside on the premises ? (*Kent v. Fittall*, [1906] 1 K.B. 60, 70). (2) Does he render services to the occupier ? (*Smith v. St. Michael, Cambridge, Overseers*). The distinction is important because (i) a lessee can be distrained on but not a licensee (*Hancock v. Austin* (1863), 14 C.B.N.S. 634), or a lodger ; (ii) a lessee can bring trespass against the lessor and third parties, but a licensee cannot sue the licensor (*Allan v. Liverpool Overseers* (1874), L.R. 9 Q.B. 180, 191) or third parties, (*Hill v. Tupper* (1863), 32 L.J. Ex. 217) in trespass ; (iii) a lessee is liable to be rated, but not a licensee (*Watkins v. Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350) ; (iv) a contract for a lease must be in writing, but this is not universally true of contracts for licences ; (v) a licensee is always protected by the Law of Distress (Amendment) Act, 1908, whereas some underleases fall outside the statute ; (vi) a lease is always assignable in the absence of a specific prohibition, but not all licences can be transferred. A servant who is *required* to occupy premises belonging to his master for the more efficient performance of his duties is not a tenant (*Dobson v. Jones* (1844), 5 Man. & G. 112 ; *Thompsons (Funeral Furnishers), Ltd. v. Phillips*, [1945] 2 All E.R. 49, C.A.) and can be evicted in breach of contract by his master (*Mayhew v. Suttle* (1854), 4 E. & B. 347). But a servant who is merely *permitted* to occupy premises belonging to his master may be a tenant, even though he pays no rent (*Dover v. Prosser*, [1904] 1 K.B. 84).

1062. A lease for years may contain a covenant *Covenant* or contract for renewal of the term granted by it ; *for renewal* and such covenant or contract will be enforceable

against the lessor and all persons acquiring his interest in the land.^(a) A covenant for perpetual renewal entered into in favour of the lessee and his successors in title will not be void as violating the Rule against Perpetuities (§§ 1679-1685);^(b) but, if entered into after 1925, it will operate as an agreement for a demise for a term of two thousand years, or, in the case of a sub-demise, for a term less by one day than the term out of which it is to be demised.^(c) A similar covenant in favour of other persons claiming in their own right will be void as erecting a perpetuity.^(d)

(a) *Isteed v. Stoneley* (1580), 1 And. 82.

Anon. (1583), Moore (K.B.) 159.

Richardson v. Sydenham (1703), 2 Vern. 447.

Brook (Earl) v. Bulkeley (1754), 2 Ves. Sen. 498.

Muller v. Trafford, [1901] 1 Ch. at p. 60, *per* FARWELL, J.

(b) *Bridges v. Hitchcock* (1715), 5 Bro. Parl. Cas. 6.

Re London Corpn., London Corpn. v. Great Western and Metropolitan Railways, [1910] 2 Ch. 314.

Mount Edgcombe (Earl) v. Inland Revenue Comrs., [1911] 2 K.B. 24.

(c) L.P.A., 1922, Sched. XV, para. 7. The effect of the Act on a perpetually renewable lease is, (a) it is converted into a lease for 2,000 years; (b) it can be terminated *by the lessee only* by a written notice of ten days expiring on any date when the lease would, but for the Act, have come up for renewal, e.g. at the end of the seventh, fourteenth, etc. year; (c) the lessee remains liable on the covenants only while he actually retains the estate; (d) the lease is deemed to contain a covenant by lessee to register every assignment or devolution with the lessor within six months of the assignment etc., and to pay one guinea for such registration; (e) fines etc., for renewal are converted into additional rent in case of perpetually renewable lease existing at end of 1925.

(d) *Hope v. Gloucester Corpn.* (1855), 7 De G.M. & G. 647.

The covenant for renewal only binds the interest of the covenantor, not (in the absence of statutory powers) any interest in remainder or reversion on it (*Muller v. Trafford*, *ubi supra*, at p. 62).

*Single
covenant*

1063. Unless a contrary intention appears, expressly or by implication,^(a) a covenant to renew is presumed to be exhausted by a single exercise; and the lessee is not entitled to have a similar covenant inserted in the renewed lease.^(b) *Semble*: this rule does not apply to options to purchase the reversion.^(c)

- (a) *Furnival v. Crew* (1744), 3 Atk. 83.
Copper Mining Co. v. Beach (1823), 13 Beav. 478.
Hare v. Burges (1857), 4 K. & J. 45.
Re Smith's (Henry) Charity, Hartlepool (1882), 20 Ch. D. at p. 518,
 JESSEL, M.R. points out the undesirability of renewable leases.
 (b) *Iggulden v. May* (1806), 7 East, 237.
Dowling v. Mill (1816), 1 Madd. 541.
Brown v. Tighe (1834), 2 Cl. & Fin. 396.
Hare v. Burges, *ubi supra*, at p. 54, *per* WOOD, V.C. (lives).

But see the remarks of SELBORNE, C., in *Swinburne v. Milburn* (1884), 9 App. Cas. at p. 850 (lives), and *Green v. Palmer*, [1944] Ch. 328. *Northchurch Estates v. Daniels*, [1947] Ch. 117; [1946] 2 All E.R. 524. A contract entered into on or after January 1, 1926, to renew a lease or underlease for a term exceeding sixty years from the termination of the lease or underlease is void. (L.P.A., 1922, s. 145, Sched. XV, para 7.)

- (c) *Batchelor v. Murphy*, [1926] A.C. 63. (But see *Sherwood v. Tucker*, [1924] 2 Ch. 440.)

1064. An estate from year to year ("yearly *Yearly tenancy* tenancy") is created by—

- (i) any expressions in a lease from which the intention of the parties to create such an estate can be gathered ;

Doe d. Clarke v. Smaridge (1845), 7 Q.B. at p. 959, *per* LORD DENMAN, C.J.

Swift v. Ambrose (1931), 47 T.L.R. 594.

If the lease is expressed to create a tenancy "for one year and so on from year to year", or to that effect, the yearly tenancy does not begin till the expiry of the first year, and cannot, consequently, in the absence of express provision, be determined before the end of the second year (*Denn d. Jacklin v. Cartwright* (1803), 4 East, 29; *Doe d. Chadborn v. Green* (1839), 9 Ad. & El. 658; *Cannon Brewery v. Nash* (1898), 77 L.T. 648). A lease containing a grant of a yearly tenancy may include an agreement for renewal at the option of the tenant (*Gray v. Spyer*, [1922] 2 Ch. 22).

- (ii) a general demise, not operating as a grant for life, at an annual rent, without mention of any term ;

Agard v. King (1600), Cro. Eliz. 775.

Roe d. Bree v. Lees (1777), 2 Wm. Bl. 1171.

Richardson v. Langridge (1811), 4 Taunt. 128.

Lewis v. Baker, [1906] 2 K.B. 599.

- (iii) an occupation, by permission of the owner

of land, under a void lease, followed by the acceptance by such owner of a yearly rent, or some aliquot part thereof. In such a case, the terms of the void lease, in so far as the lessor had power to enter into them, and in so far as they are not inconsistent with a yearly tenancy, will be binding on the parties ;

Doe d. Rigge v. Bell (1793), 5 Term Rep. 471.

Doe d. Pennington v. Tanière (1848), 12 Q.B. 998.

Lee v. Smith (1854), 9 Exch. 662.

Magdalen Hospital v. Knotts (1879), 4 App. Cas. at p. 335, *per* Lord SELBORNE.

Martin v. Smith (1874), L.R. 9 Exch. 50.

It seems a little doubtful how far this doctrine would apply if the lease were void under the provisions of a disabling statute. Both Lord CAIRNS and Lord SELBORNE, in *Magdalen Hospital v. Knotts*, *ubi supra*, seem to have thought that it would.

- (iv) a holding over, accompanied by payment of rent, after the expiry or determination of a previous definite tenancy,^(a) at an annual rent. In such a case, the parties will continue to be bound by such of the terms of the former lease as are not inconsistent with a yearly tenancy ;^(b) unless there is evidence of agreement to the contrary.^(c)

(a) It is immaterial that the previous tenancy was not for a year (*Swift v. Ambrose* (1931), 47 T.L.R. 594).

(b) *Right d. Flower v. Darby and Bristow* (1786), 1 Term Rep. 159.

Doe d. Martin v. Watts (1797), 7 Term Rep. 83.

Bishop v. Howard (1823), 2 B. & C. 100.

Doe d. Clarke v. Smaridge (1845), 7 Q.B. 957.

Dougal v. McCarthy, [1893] 1 Q.B. 736. (In this case no rent had been paid.)

(c) *Wedd v. Porter*, [1916] 2 K.B. 91.

On the other hand, a person who has contracted to purchase land, and is let into possession pending completion of the contract, is not, in the absence of special stipulation, a tenant from year to year, but a tenant at will, to the vendor (*Ball v. Cullimore* (1835), 2 Cr. M. & R. 120 ; *Howard v. Shaw* (1841), 8 M. & W. 118).

ated by six months' notice expiring at the end of a year of the tenancy ;^(a) and, in cases to which the Agricultural Holdings Act, 1923, applies, only by a year's notice from the end of the current year of tenancy, or where a receiving order in bankruptcy has been made against the tenant.^(b) Where a term is fixed to expire at a certain date,^(c) or on the happening of a specific event,^(d) no notice to determine is necessary ; except in pursuance of express agreement or the provisions of a statute.^(e)

(a) *Legg v. Strudwick* (1709), 2 Salk. 414.

Denn d. Jacklin v. Cartright (1803), 4 East, 29.

Where the original term* was for more than a year, a tenancy from year to year created by holding over and payment of rent (§ 1064 (iv)) can only be determined by notice expiring on an anniversary of the expiry of the original term (*Croft v. Blay (William F.), Ltd.*, [1919] 2 Ch. 343). In any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit should be equal to the length of the period and must expire at the end of the current period (*Lemon v. Lardeur*, [1946] K.B. 613, C.A. approving *Queen's Club Gardens Estates, Ltd. v. Bignell*, [1924] 1 K.B. 117 and overruling *Simmons v. Crossley*, [1922] 2 K.B. 95). In the case of a weekly tenancy, where no contrary intention appears, a notice given on the day corresponding to that on which the tenancy commenced and expiring on the corresponding day of the following week is valid, seven clear days' notice is unnecessary (*Newman v. Slade*, [1926] 2 K.B. 328).

(b) Agricultural Holdings Act, 1923, s. 25.

Flather v. Hood (1928), 44 T.L.R. 698.

(c) *Messenger v. Armstrong* (1785), 1 Term Rep. at p. 54, per Lord MANSFIELD, C.J.

Right d. Flower v. Darby and Bristow (1786), *ibid.* at p. 162, per Lord MANSFIELD, C.J.

Cobb v. Stokes (1807), 8 East, 358.

(d) *Doe d. Bromfield v. Smith* (1805), 6 East, 530.

(e) The Agricultural Holdings Act, 1923, s. 15 (2), entitles the tenant of a mortgagor, whose lease is not binding on the mortgagee, in the case of all holdings to which that Act applies, to six months' notice of termination by the latter, if the tenant holds at a rack rent, and his term was originally not for longer than twenty-one years. In the case of an agricultural tenancy for two years or upwards created after 1920, one year's notice on either side is necessary, notwithstanding any agreement to the contrary (Agricultural Holdings Act, 1923, s. 23, s. 25; *Edell v. Dulieu*, [1924] A.C. 38).

1066. When, in pursuance of an express clause in *Option to determine*

a lease, the lessor or the lessee is entitled to put an end to the term created by such lease before the expiry thereof, reasonable notice of his intention to exercise such right must be given to the other party.^(a) In the absence of expressions to the contrary in the lease, an option to determine will operate both in favour of the lessor and the lessee.^(b)

(a) *Goodright d. Hall v. Richardson* (1789), 3 Term Rep. 462.

(b) *Edell v. Dulieu*, [1924] A.C. 38.
Flather v. Hood (1928), 44 T.L.R. 698.

This § must be read as subject to the exceptions created by the Agricultural Holdings Act, 1923 (*Edell v. Dulieu, ubi supra*).

Rent

1067. It is not necessary to the creation of an estate for years, that a rent should be reserved by the lessor.^(a) But if a rent is reserved, it must be reserved in favour of the lessor,^(b) and must be of a certain fixed amount or must be so stated that it can afterwards be ascertained with certainty;^(c) and the lessor cannot reserve as his own property any part of the annual profits of the land.^(d)

(a) Litt. s. 58.
Sheppard, Touchstone, 268.

(b) Litt. s. 346.

(c) Litt. s. 213.

Parker v. Harris (1692), 1 Salk. 262. It is sufficient if by calculation and upon the happening of certain events it becomes certain; provided it can be so ascertained from time to time, it is no objection that the rent is of fluctuating amount (*Selby v. Greaves* (1868), L.R. 3 C.P. 594).

(d) Co. Litt. 142 a.

The rent need not consist of money, it may consist in the render of chattels or the performance of services (*Doe d. Edney v. Benham* (1845), 7 Q.B. 976). And there seems no objection to a reservation as rent of a part of the ore produced under a mining lease (*Buckley v. Kenyon* (1808), 10 East, 139).

Rent incident to reversion

1068. Rent reserved by a lease is annexed and incident to, and goes with, the interest of the lessor in the land or any part thereof, notwithstanding that such interest may be divided amongst two or more

persons ("severance");^(a) and each of such persons will be entitled to recover, from time to time, the proportion of such rent which is properly attributable to his share of the reversion.^(b) For the purposes of this §, a severance means a division of the lessor's estate, by operation of law or otherwise, among owners in severalty; not a vesting of such estate in co-owners.^(c)

- (a) L.P.A., 1925, s. 141 (1). This enactment applies to leases made before or after 1926; but only to severances or acquisitions of a reversion after 1925. Where the rent was reserved in money or other divisible matter, the rule was the same at common law (Co. Litt. 148).
- (b) *Ibid.* s. 141 (2). This enactment refers to difficulties of procedure only, and does not affect substantive rights (*Schalit v. Nadler, Ltd.*, [1933] 2 K.B. 79).
- (c) Though there appears to be no definition of the word "severance" in this part of the L.P.A., it seems clear, from the examples of severance given in the passage from Coke, that this was the kind of severance contemplated by the common law rule. The examples are: (1) purchase of part of the lessee's estate by the lessor, (2) recovery of part of the land by the lessor in an action of waste, (3) grant or devise of part of the reversion, (4) lawful eviction by the lessor of the lessee from a part of the land (*Clun's Case* (1613), 10 Co. Rep. 127 a), to which may be added (5) similar eviction by a stranger by title paramount (*Smith v. Malings* (1608), Cro. Jac. 160), (6) partition among parcellers (*Ewer v. Moyle* (1600), Cro. Eliz. 771), while partition existed, (7) formerly, descent of different parts of the land to different heirs, e.g. by common law and local custom (*ibid.*). There was at one time some doubt whether, at the common law, apportionment could be claimed where the severance occurred by the act of the parties (*Ewer v. Moyle, ubi supra*); but the opinion of Coke ultimately prevailed. The lessee is entitled to have the apportionment made by a jury (*Bliss v. Collins* (1822), 5 B. & Ald. 876). Of course, no division of the land which the lessee may make can affect the liability of every part of the land for the whole of the rent. But the purchaser of part of the leasehold interest in the land is not personally liable, even while the term is vested in him, for more than his due proportion of the rent, based on the value of the land at the time when the severance was made (*Salts v. Battersby*, [1910] 2 K.B. 155).

1069. Where no other days of payment are fixed by the terms of the lease or the previous practice of the parties, rent is payable at the end of each year of the term^(a) or of such other aliquot part of the When rent payable

year as is expressed in the reservation of the rent.^(b) If the rent is a fixed sum for the whole term, it is payable, in the absence of contrary agreement, at the end of the term ;^(c) but a rent reserved without specification of the period in respect of which it is payable will be presumed to be an annual rent.^(d)

(a) *Coomber v. Howard* (1845), 1 C.B. 440.

Collett v. Curling (1847), 10 Q.B. 785.

(b) Where no express term is mentioned, the period in respect of which the rent is payable will be some indication of the intended length of the term (*Wilkinson v. Hall* (1837), 3 Bing. N.C. 508).

(c) There appears to be no authority for this proposition ; but it is conceived that it is correct. Rent is due on the whole of the day on which it is payable, but is not in arrear (and therefore cannot be distrained for) till after midnight of that day (*Dibble v. Bowater* (1853), 2 E. & B. at p. 568, *per* Lord CAMPBELL, C.J.).

(d) *Harrington v. Wise* (1596), 2 Roll. Abr. 449-50.

*Rights of
lessee for
years*

1070. *Primâ facie*, a lease for years gives only a right to possession of the surface and enjoyment of the profits of the land ;^(a) but if it is expressed, or to be implied from the circumstances, that the lease was granted for a particular purpose or purposes, the lessee, in addition to his right to possession of the surface and enjoyment of the annual profits, will be entitled, as against the lessor, to use the land in any manner reasonably necessary for carrying out such purpose or purposes.^(b)

(a) *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562.

(b) *Robinson v. Milne* (1884), 53 L.J. Ch. 1070, *per* NORTH, J.
Elwes v. Brigg Gas Co., *ubi supra*.

There appears to be singularly little authority regarding the general rights of the lessee for years, as against the lessor. This apparent anomaly probably arises from the facts (1) that, in the great majority of cases, these rights are settled by the express terms of the lease, and (2) that, in the absence of such express terms, the position of the lessee is judged from the negative standpoint of the law of waste (*post*, Section II, Title III). Building and mining leases are obvious examples of exceptions from the rule.

Estovers

1071. A lessee for years is entitled, notwithstanding the provisions of the law against waste, but

subject to the terms of his lease, to the same rights of reasonable estovers as a tenant for life (*post*, § 1249).

Co. Litt. 41 b.

1072. A lessee for years whose interest is determined by some uncertain event not caused by himself, including a tenant from year to year whose interest is determined by the lessor,^(a) is entitled to emblements, or the statutory substitute therefor (*post*, § 1073), in the same manner as a tenant for life in similar circumstances (*post*, § 1250).^(b) But a lessee for years whose term expires at a fixed and certain date, has no right to emblements or any substitute therefor ; except in pursuance of express agreement, special custom, or statute.^(c) *Emblements*

(a) *Kingsbury v. Collins and Elmes* (1827), 4 Bing. 202.

(b) Co. Litt. 56 a.

(c) Litt. s. 68.

Wigglesworth v. Dallison (1779), 1 Doug. (K.B.) 201.

The right to emblements is unaffected by the provisions of the Agricultural Holdings Acts ; but the provisions contained in those Acts for compensation to the tenant in such cases (see Agricultural Holdings Act, 1923, ss. 1-5, 24, etc.) have practically superseded the common law rule.

1073. When the lease of a farm or lands held at rack rent is determined by the death or cesser of the estate of any landlord entitled for any uncertain interest, the lessee, instead of claims to emblements, will continue to hold and occupy such farm or lands until his occupation is determined by a twelve months' notice expiring at end of a current year of the tenancy ; the lessor's successor being substituted for the lessor in respect of the period between the determination of the lessor's interest and the determination of the tenancy. *Substitute for emblements*

Landlord and Tenant Act, 1851, s. 1.

Agricultural Holdings Act, 1923, s. 24.

Compensation for improvements

1074. Except by virtue of express agreement, special custom, or statute, a tenant for years is not entitled, at the expiration of his tenancy, to any compensation or allowance for improvements made by him, or fixtures erected by him, in or on the land.

Caldecott v. Smythies (1837), 7 C. & P. 808, *per* PARKE, B.
Mousley v. Ludlam (1851), 21 L.J.Q.B. 64.

One of the most important exceptions from the general rule is to be found in the provisions of the Agricultural Holdings Act, 1923 under which agricultural tenants (including tenants of market gardens, can obtain compensation for improvements and fixtures (s. 1 and Sched. I). The right extends to the tenant of a mortgagor under a lease which is not binding on the mortgagee (s. 57 (1)); and it cannot be waived, even by express agreement (s. 50). The method of ascertaining compensation is specially provided for by the Act (s. 1; and Sched. II); and the compensation may be made a charge on the corpus of the reversion (s. 20). A similar protection is extended to the tenants of allotments and cottage gardens by the Small-holdings and Allotments Act, 1908, s. 47, Sched. II, and its amendments. A more recent and equally important exception is created by the Landlord and Tenant Act, 1927, ss. 1-6, which, under certain conditions, give the occupant of "business premises", whose tenancy expires, compensation or other solace in respect of goodwill and improvement made by him in the premises which have increased the value of the reversion. If a tenant entitled to compensation for goodwill can show that a money payment will not adequately compensate him, he may, under certain conditions claim a new lease for a period not exceeding fourteen years. See *Cheshire, Modern Real Property*, pp. 168-176. As to the right of a tenant for years to remove fixtures set up by him see *post*, § 1323.

Duty of lessee

1075. Every lessee to whom there is delivered any writ for the recovery of the premises demised, or to whose knowledge any such writ comes, must forthwith give notice thereof to his lessor or his (? the latter's) bailiff or receiver. Failure to do so will involve a forfeiture by the lessee, to the person of whom he holds the premises, of an amount equal to the value of three years' improved or rack rent of the premises.

1076. A lessee for years, in the absence of express agreement, is liable to an action for damages or an account, if he commits any act of voluntary waste,^(a) or is guilty of permissive^(b) waste, in respect of the land comprised in his lease. But no equitable remedy will be granted against a lessee for years in respect of ameliorating waste (i.e. acts which improve the value of the inheritance);^(c) and a tenant from year to year is liable for permissive waste.^(d)

*Waste by
lessee for
years*

(a) Statute of Marlborough (52 Hen. III (1267)), c. 23. Litt. s. 67.

(b) Litt. s. 71.

Co. Litt. 53 a.

Leach v. Thomas (1835), 7 C. & P. 327, per PATTESON, J.

Yellowly v. Gower (1855), 11 Exch. at p. 294, per PARKE, B.

Davies v. Davies (1888), 38 Ch. D. 499.

There was, at one time, a good deal of doubt whether a tenant for years is liable for permissive waste (*Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532); but, so far as agricultural holdings are concerned, it was laid down by the Court of Appeal in *Wedd v. Porter*, [1916] 2 K.B. 91, that even a tenant from year to year is, in the absence of express provision, liable to cultivate in a husband-like manner, according to the custom of the country.

(c) *Jones v. Chappell* (1875), L.R. 20 Eq. at p. 541.

Doherty v. Allman (1878), 3 App. Cas. 709.

Meux v. Cobley, [1892] 2 Ch. 253.

(d) *Torriano v. Young* (1833), 6 C. & P. 8. It was said in this case that a tenant from year to year was not liable for permissive waste, but the better view seems to be that he is liable, though as stated in *Yellowly v. Gower*, *supra*, in practice the liability has been limited. There seems to be a good deal of doubt on this important point, and, the frequency of this form of tenancy being considered, the amount of authority is extraordinarily small.

The peculiarities of the action of waste have been previously noted (*ante* § 838, n.). The provision in the L.P.A., 1925, s. 135, respecting waste, does not affect tenants for years, who are seldom, if ever, "without impeachment of waste". As a matter of practice, the liabilities of a tenant for years in respect of repairs and the like are usually settled by the express terms of the lease; but, as we have already seen, some statutory provisions on the subject override the express terms of the lease. The extent of the tenant's obligation on his covenant to repair is that he must, after due allowance for the age, character and locality of the house at the time of the lease, keep it in the condition in which it would have been kept by a reasonably minded owner. (*Anstruther-Gough-Calthorpe v. McOscar*, [1924]

1 K.B. 716, C.A.; *Pembrey v. Lambdin*, [1940] 2 All E.R. 434, C.A.). The damages recoverable are not to exceed the diminution in value of the reversion owing to the breach, and no damages are recoverable if the premises are to be demolished or structurally altered in such a way as to make the repairs valueless, at or soon after the end of the term (Landlord and Tenant Act, 1927 s. 18). Where a covenant to repair contains the words "fair wear and tear excepted," these words exclude liability for dilapidations, caused, directly or indirectly in the ordinary course of nature, friction of the air, exposure, ordinary use, however serious the dilapidations may be, but there will be liability for dilapidations caused by an unfair or unreasonable user of the premises, or by a wilful act, or by fire, floods and other extraordinary events (*Taylor v. Webb*, [1937] 2 K.B. 283).

*Decorative
repairs*

1077. A lessee who has received a notice relating to internal decorative repairs to a house or other building may apply to the Court for relief; and the Court may (notwithstanding any stipulation to the contrary), if satisfied that in all the circumstances of the case the notice is unreasonable, wholly or partially relieve the tenant from liability for such repairs.

L.P.A., 1925, s. 147.

The "circumstances" include in particular, the length of the lessee's term or interest remaining unexpired. But certain kinds of liability are excluded (subs. (2)). Under the Leasehold Property (Repairs) Act, 1938, which applies to leases of houses of a rateable value not exceeding £100, for a term of twenty one years or more, of which five remain unexpired, the lessor may not commence an action for breach of the covenant to repair unless he has served on the lessee, at least one month previously a notice as specified in s. 146(1) L.P.A., 1925 (*post* § 1333). After service of such notice, the lessee may within twenty-eight days serve on the lessor a counter-notice, stating that he claims the benefit of the Act of 1938. If this counter-notice is served, the lessor may not proceed to enforce his right of re-entry or his right to damages, either by action or otherwise, without leave of the Court.

*Alienation
by lessee for
years*

1078. Subject to the terms of his lease, a lessee for years may alienate his estate, or create any smaller terms of years out of it by way of sub-demise.

The statement in the text is so amply borne out by assumptions in statutes and decisions, that it is almost unnecessary to quote authority for it. It is, however, important to note the difference between an

liation of the lessee's estate ("assignment") and an under-lease of part of the original term. By whatever words effected (*Parmenter v. Webber* (1818), 8 Taunt. 593), an alienation of any part of the land or the whole term makes the alienee a tenant of the original lessor, and, therefore, liable to the lessor, so long as the estate remains in him (the alienee), by privity of estate, for the rent and covenants of the lease, in respect of that part of the land. The lessee also remains liable, notwithstanding any assignment, during the remainder of the term. On the other hand, an alienation for part only of the original term makes the alienee a tenant of the original lessee, and, therefore, only an under-lessee, without privity of estate, of the original lessor, who cannot charge the alienee personally with rent and covenants, though he can, of course, pursue his remedies against the land (*Holford v. Hatch* (1779), 1 Doug. (K.B.) 183; *Palmer v. Edwards* (1783); *ibid.* 187, n.). Equally clear is it, that a condition in a lease for years prohibiting alienation or under-letting, either absolutely or on terms, is valid; for breach of such a condition was, until recently, one of the few causes of forfeiture against which no relief could be given to an immediate lessee, either under statute (Conveyancing Act, 1881, s. 14 (b) (i)) or under the general jurisdiction of the Court (*Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q.B. 835). But an under-lease granted in defiance of such a prohibition none the less confers an interest in the land; even when it is a ground of forfeiture of the head lease (*Parker v. Jones*, [1910] 2 K.B. 32). Relief to the under-lessee may, however, be given (*post*, § 1336).

1079. A transfer of the lessee's estate to the person in whom for the time being the reversion *Surrender of term* hereon is vested, by whatever words effected,^(a) operates as a surrender, and (subject to § 1336 *post*) destroys the lessee's estate by merger (*ante*, § 1039).^(b) But when a reversion expectant on a lease of land is surrendered or merged, the estate or interest which, as against the lessee for the time being, confers the next vested right to the land, is deemed to be the reversion (*semble*, on the interest of the under-lessee) for the purpose of preserving the same incidents and obligations as would have affected the original reversion had there been no surrender or merger thereof. This § only applies to surrenders or mergers effected after 1st October 1845.^(c) A lease may be surrendered

with a view to the acceptance of a new lease in place thereof without a surrender of any under-lease derived thereout.^(a)

(a) *Cottee v. Richardson* (1851), 7 Exch. 143.

(b) Co. Litt. 337 b.

(c) L.P.A., 1925, s. 139.

(d) *Ibid.* s. 150. The head lessor, under-lessor, and under-lessee continue to stand to one another in the same relation as before, except so far as the new lease modifies the arrangements between the first two.

At the common law, a surrender, whether by act of the parties or by operation of law, of a term out of which a sub-term had been created, destroyed the reversion on the sub-term, the owner of which, therefore, ceased to be liable for rent and other incidents of a reversion during the rest of his sub-term. In practice this rule caused extreme inconvenience, and was partially altered by s. 6 of the Landlord and Tenant Act, 1730, which applied only to terms surrendered in order to be renewed. The rule in the text was introduced, in slightly different terms, by the Real Property Act, 1845, s. 9, now repealed. For the case in which a trustee in bankruptcy disclaims a mesne term under his statutory powers, see Bankruptcy Act, 1914, s. 54 (3)-(6).

*Covenants
running with
land*

. 1080. The benefit and the liability of covenants and conditions in a lease, having reference to the subject-matter thereof,^(a) pass to successive assignees of the term and the reversionary estate thereon.^(b) Where the reversion has been severed, the assignee of each part of the reversion is entitled to recover all rent and enforce all conditions and powers of re-entry (including the right to determine the lease by notice to quit or otherwise), in respect of his part of the reversion;^(c) and the benefit of every covenant and condition contained in the lease having reference to the subject-matter thereof, will pass to the assignees of any part of the immediate reversion thereon, notwithstanding severance of that reversion.^(d)

(a) This is the language of the Conveyancing Act, 1881, s. 10 (1); and it is retained in s. 141 of the L.P.A., 1925, which has superseded it. The older phrase was "which touch and concern". (As to the meaning of the restriction, see *Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q.B. 79, *per* Lord Russell, C.J., at pp. 88-90; *Ricketts v. Enfield (Churchwardens)*, [1909] 1 Ch. 544, *per*

NEVILLE, J., at pp. 552-5; *Dyson v. Forster*, [1909] A.C., per Lord MACNAGHTEN, at p. 102). A covenant has reference to the subject matter of the lease if it effects the landlord *qua* landlord or the tenant *qua* tenant. Likewise, if it restricts, or requires the doing to or on the demised premises of anything which physically affects them, or the manner in which they may be used or enjoyed or their produce, or of itself, without the aid of extraneous circumstances, affects the nature, quality or value of the demised premises (*Congleton Corpn. v. Pattison* (1808), 10 East, 130).

(b) L.P.A., 1925, ss. 141, 142.

It seems that there is no statutory authority for saying that the burden of covenants and conditions assumed by the lessee passes with an assignment of the term; but the rule of the common law is implied in numerous decisions, e.g. *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238; *Moule v. Garrett* (1872), L.R. 7 Exch. 101. The Covenants Act of 1540 was expressly confined to indentures; and even the Conveyancing Act was restricted in its application to written leases (*Blane v. Francis*, [1917] 1 K.B. 252). The benefit of the reversionary rights conferred by the Act of 1925 may be enforced by "the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may be, of the land leased" (L.P.A., 1925, s. 141 (2)).

(c) L.P.A., 1925, ss. 140, 141 (2).

Smith v. Kinsey (1936), 53 T.L.R. 45, C.A. The operation of these sections appears to extend to all leases and tenancies (s. 154), whenever made; except that, where the lease was made before 1882, it does not affect the severance of the reversionary estate or partial avoidance or cesser of the term effected before 1925 (*ibid.* (3)).

Even at the common law, severance of the reversion, if it was effected by operation of law, e.g. by inheritance among co-parceners, did not destroy the benefit of a condition (Co. Litt. 215 a; *Piggott v. Middlesex C.C.*, [1909] 1 Ch. 134). It is hardly necessary to observe, that no severance of the lessee's interest can prevent the liabilities of the lease being enforced against the whole of the land (*Webber v. Smith* (1689), 2 Vern. 103).

(d) L.P.A., 1925, s. 141 (1).

It must be carefully observed, that neither the common law nor any statute confers, in the absence of expressions to the contrary, on any person other than the assignee of the reversion or of the term, any rights in respect of "running" covenants or conditions. Thus, for example, an under-lessee cannot claim the benefit of a covenant entered into by the head-lessor with the under-lessor; even though the head-lessor has acquired the under-lessor's estate, and the effect of the breach of covenant is to damage the under-lessee (*South of England Dairies, Ltd. v. Baker*, [1906] 2 Ch. 631). On the other hand, a covenant which "runs with the land", entered into since the passing of the Real Property Act, 1845, s. 5, can, if expressed to be made in

favour of a stranger to the lease, be enforced by that stranger's successors in title (*Dyson v. Forster*, [1909] A.C. 98; L.P.A., 1925, s. 56).

*Condition
against
alienation*

1081. Notwithstanding any express provision to the contrary in the lease a covenant or condition to the effect that the lessee shall not assign, underlet, part with the possession, or dispose of the land or property leased, without licence or consent, is deemed to be subject to a proviso that such licence or consent is not to be unreasonably withheld^(a) :—

(a) Landlord and Tenant Act, 1927, s. 19.

- (i) unreasonableness on the part of the lessor will not be presumed, in the absence of clear evidence ;^(b) but, when such unreasonableness clearly exists, the lessee may alienate, notwithstanding the refusal of the lessor's permission ;^(c) and he can obtain a declaration by the Court of his right to do so.^(d)

(b) *Jenkins v. Price*, [1908] 1 Ch. 10.

(c) *Treloar v. Bigge* (1874), L.R. 9 Exch. 151.

Balls Brothers, Ltd. v. Sinclair, [1931] 2 Ch. 325.

(d) *West v. Gwynne*, [1911] 2 Ch. 1, C.A. The lessee must ask for consent before he assigns, and even though it could not properly be refused (*Eastern Telegraph Co. v. Dent*, [1899] 1 Q.B. 835, C.A.), or if he forgets to do so, he becomes liable to forfeiture (*Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417, C.A.). Refusal is unreasonable unless it concerns the personality of the assignee, or the proposed user of the premises by him, but in considering the latter point the landlord can take into account the effect of the proposed user on property retained by him (*Premier Confectionery (London) Co., Ltd. v. London Commercial Sale Rooms, Ltd.*, [1933] Ch. 904; *Re Gibbs and Houlder Bros. & Co., Ltd.'s Lease, Houlder Bros. & Co., Ltd. v. Gibbs*, [1925] Ch. 575) doubted in *Tredegar (Viscount) v. Harwood*, [1929] A.C. 72 at pp. 78, 81, by Lord DUNEDIN and Lord PHILLIMORE on this test of reasonableness, but followed in *Re Swanson's Agreement, Hill v. Swanson*, [1946] 2 All E.R. 628, EVERSHED, J.; (*Maley v. Fearn, ibid.* 583 (as to meaning of "lawful sub-tenant" within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3))).

- (ii) no action can be brought to compel the lessor to grant permission, or to obtain damages

for his refusal, unless the lease contains an express contract by him to grant permission in circumstances which have happened ;

Treloar v. Bigge, *ubi supra*.

Andrew v. Bridgman, [1908] 1 K.B. at p. 598, *per* COZENS-HARDY, M.R.

- (iii) no fine or sum of money in the nature of a fine may (in the absence of express provision in the lease) be exacted for or in respect of such permission ; but the payment of a reasonable sum in respect of expenses may be required,^(a) and a contract to pay such a fine is not an illegal contract ;^(b)

(a) L.P.A., 1925, s. 144. This section, which is retrospective (*West v. Gwynne*, [1911] 2 Ch. 1), applies to all provisions against alienation in leases ; whether there is any qualification of "unreasonableness" or not. Fine includes a premium or foregift, and any payment of that nature (L.P.A., s. 205 (1) (xxiii) ; any valuable consideration given or required in such circumstances that, if it were money, it would be what is commonly known as a fine (*Waite v. Jennings*, [1906] 2 K.B. 11, at p. 18).

(b) *Andrew v. Bridgman*, [1908] 1 K.B. 596. But a refusal to allow alienation, except upon payment of a fine, entitles the lessee to alienate without permission.

- (iv) a stipulation that the proposed alienee shall covenant with the lessor for the payment of the rent and performance of the covenants during the remainder of the term is not a fine within the meaning of the L.P.A., 1925, s. 144 ;^(a) but a stipulation for an increased rent to be paid by the alienee is ;^(b)

(a) *Waite v. Jennings*, [1906] 2 K.B. 11, at p. 16. The decision was on the similar wording of the Conveyancing Act, 1892, s. 3, now repealed.

(b) *Jenkins v. Price*, [1907] 2 Ch. 229. The decision was reversed on appeal ; but on another point.

- (v) a refusal to allow the owner of the term to assign to a corporation is, in the absence of special circumstances, an unreasonable refusal ;^(a) and so is a refusal to allow an assignment to the lessee's wife, except upon

condition of the assignor undertaking responsibility during the whole of the term.^(b)

- (a) *Jenkins v. Price*, [1908] 1 Ch. 10.
Willmott v. London Road Car Co., Ltd., [1910] 2 Ch. 525.
Re Gibbs and Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd. v. Gibbs, [1925] Ch. 575.
 (b) *Evans v. Levy*, [1910] 1 Ch. 452.

For relief against forfeiture for conditions in leases generally, see *post*, §§ 1332-1339. A covenant against assignment or underletting is restricted in its operation to a voluntary dealing with the property *inter vivos*; a bequest of the lease is no breach (*Crusoe d. Blencowe v. Bugby* (1771), 3 Wils. 234, 237), nor is the involuntary vesting of the lease in the trustee in bankruptcy of the lessee (*Doe d. Goodbehere* of the lease under statutory provisions (*Slipper v. Tottenham and v. Bevan* (1815), 3 M. & S. 353, 360) or on the compulsory sale *Hampstead Junction Rly. Co.* (1867), L.R. 4 Eq. 112). A mortgage made by the grant of a sub-lease is a breach, but not an equitable mortgage by deposit of title deeds; (*Doe d. Pitt v. Hogg* (1824), 4 Dow. & Ry. (K.B.) 226, 229), nor letting an advertiser fix a billboard to the wall (*Stening v. Abrahams*, [1931] 1 Ch. 470).

Effect of licence

1082. A licence granted to a lessee to do any act, unless otherwise expressed, extends only to the permission actually given, or to the specific breach of any provision or covenant referred to. But this § only applies to licences granted after 13th August 1859.

L.P.A., 1925, s. 143.

At the common law a licence terminated the condition licensed to be broken (*Dumpro's Case* (1603), 4 Co. Rep. 119 b).

Liability of assignee

1083. When a lease has been *bonâ fide* assigned by an assignee thereof, such assignee ceases to be liable for the rent thereby reserved or on the covenants therein contained;^(a) except in so far as the rent has accrued due or breaches have been committed while the term was vested in him, and except in so far as he may have incurred liability by express contract.^(b) The original lessee remains liable in respect of such rent and covenants during the continuance of the term;^(c) but he is entitled to be

indemnified in respect of rent accruing and breaches incurred after he has assigned over the term, by the person in whom the term was vested when such rent accrued or breaches occurred.^(d)

- (a) *Barnfather v. Jordan* (1780), 2 Doug. (K.B.) 452 }
Chancellor v. Poole (1781), 2 Doug. (K.B.) 764 } (rent).
Taylor v. Shum (1797), 1 Bos. & P. 21 }
Beardman v. Wilson (1868), L.R. 4 C.P. 57 (covenants).
 But see *Butler Estates Co., Ltd. v. Bean*, [1942] 1 K.B. 1, and
Lyons (J.) & Co., Ltd. v. Knowles, [1943] K.B. 366.

It makes no difference that the alienation was in defiance of a covenant in the lease (*Paul v. Nurse* (1828), 8 B. & C. 486; *Re Johnson, Ex parte Blackett* (1894), 1 Mans. 54. *Quære*: if there had been a condition that on such assignment the lease should be void.

In a lease made before 1926 it was laid down in *Spencer's Case* (1583), 5 Co. Rep. 16 a, that a covenant to do something entirely new on the demised premises, such as to build a wall, did not bind his assigns unless the lessee covenanted for himself and assigns. This rule did not apply to a covenant relating to something already in existence; here it was immaterial whether the covenant mentioned assigns. This distinction between a covenant relating to a thing *in esse* and a thing *in posse* still applies to leases made before 1926, but does not apply to leases made after 1925 (L.P.A., 1925, s. 79).

- (b) *Waite v. Jennings*, [1906] 2 K.B. 11.
 (c) The original lessee of a perpetually renewable lease which is converted into a term of 2,000 years is only liable during such time as the lease is actually vested in him or in his personal representatives. (L.P.A., 1922, 15th Sched., para. 11).
 (d) *Burnett v. Lynch* (1826), 5 B. & C. 589.
Moule v. Garrett (1872), L.R. 7 Exch. 101. But the liability to indemnify only attaches to assignees in the ordinary sense of the term, not to execution creditors (*Johns v. Pink*, [1900] 1 Ch. 296). A covenant to this effect by the assignee is now, in the absence of contrary expressions, implied in the assignment for valuable consideration of the entirety of the land comprised in a lease (L.P.A., 1925, s. 77 (1) (C)). An express covenant of indemnity and the covenant implied by s. 77, bind the assignee after he has assigned.

1084. In leases falling within the operation of the Landlord and Tenant Act, 1927 (*ante*, § 1074, n.), a provision requiring the lessee to refrain from effecting improvements without the licence or consent of the lessor is (notwithstanding any express *Licence for improvements*

provision to the contrary) to be read as subject to a proviso that such licence or consent shall not be unreasonably withheld.^(a) But the *onus* of proving unreasonableness rests upon the lessee.^(b)

(a) Landlord and Tenant Act, 1927, s. 19 (2).

Balls Brothers, Ltd. v. Sinclair, [1931] 2 Ch. 325.

(b) *Woolworth (F. W.) & Co., Ltd. v. Lambert*, [1937] Ch. 37, C.A.

Semble, there is no corresponding provision for improvements to that providing against a fine being demanded for a licence to assign (L.P.A., 1925, s. 144).

*Re-entry by
lessor*

1085. A lessor cannot, except as hereinafter mentioned, recover possession of the land during the continuance of the term, on the ground of failure of the person in whom the term is vested to pay the rent or perform the covenants of the lease, unless there is a condition of re-entry or forfeiture to that effect.^(a) But if any tenant deserts premises which have been demised at a rent equal to three-fourths of their yearly value, owing a half-year's rent, and leaving no sufficient distress, the lessor, whether the lease contains a condition of re-entry or not,^(b) may recover possession of the premises in a summary way on application to two justices,^(c) or a police or stipendiary magistrate,^(d) in manner provided by the Distress for Rent Act, 1737.^(e) And a lessor, under an open contract to grant a lease, is entitled to have inserted in the lease a condition of re-entry on non-payment of rent, but not on non-performance of any other covenants contained in the lease.^(f)

(a) *Doe d. Willson v. Phillips* (1824), 2 Bing. 13.

(b) *Doe d. Darke v. Bowditch* (1846), 8 Q.B. 973.

The enforcement of conditions of re-entry in leases is subject to important statutory restrictions. (See §§ 1332-1339 *post*.)

(c) Deserted Tenements Act, 1817.

(d) Metropolitan Police Courts Act, 1840, s. 13.

Stipendiary Magistrates Act, 1858, s. 1.

(e) S. 16.

(f) *Hodgkinson v. Crowe* (1875), 10 Ch. App. 622.

Re Anderton and Milner's Contract (1890), 45 Ch. D. 476.

Flexman v. Corbett, [1930] 1 Ch. 672—a case dealing with the meaning of “unusual covenants”.

1086. When the term created by a lease has expired or been duly determined, the lessor is entitled to recover possession of the land by peaceable entry or action of Ejectment ;^(a) and, if the term did not originally exceed seven years, nor the rent twenty pounds a year without fine, upon proof of neglect or refusal of the tenant or occupier to give up possession, the lessor may obtain from two justices in petty sessions, or a police or stipendiary magistrate, a warrant to secure possession through a constable, by force if necessary.^(b)

Recovery by lessor after expiry of term

(a) For details see *ante*, § 813, n.

A tenant who wilfully holds over after the determination of his term, and after demand and written notice, is liable to pay double value (Landlord and Tenant Act, 1730, s. 1) ; and a tenant who fails to deliver up possession on the expiry of a notice of quitting given by him is liable to pay double rent (Distress for Rent Act, 1737, s. 18) for the period during which he retains possession.

(b) Small Tenements Recovery Act, 1838, s. 1.

Stipendiary Magistrates Act, 1858, ss. 1 and 2.

Various special statutory provisions have from time to time been passed to facilitate the recovery of parish property (Poor Relief Act, 1819, ss. 24 and 25), cottage allotments (Allotments Act, 1832, s. 6), allotment gardens (Inclosure Act, 1845, s. 111), War Office lands (Defence Act, 1859, s. 5), and Admiralty lands (Admiralty Lands and Works Act, 1864, s. 12), etc. But these are not of sufficiently general interest to justify a detailed statement.

1087. In the absence of express contract, the only liability undertaken by the lessor in respect of the security of the interest in the land of the lessee for years is a liability for quiet enjoyment by the lessee ^(a) during the continuance of the lessor's interest in the land.^(b) Such liability extends to the acts of the lessor and those of all persons claiming through him ;^(c) but it does not extend to the acts of mere

Liability for quiet enjoyment

tortfeasors,^(d) and it is doubtful if it extends to the acts of persons claiming by title paramount.^(e)

(a) Sheppard, *Touchstone*, 165.

Hall v. City of London Brewery Co. (1862), 2 B. & S. 737.

Baynes & Co. v. Lloyd & Sons, [1895] 2 Q.B. 610. But see the doubt expressed by KAY, L. J., in delivering the judgment of the C.A., in [1895] 2 Q.B. at p. 615.

Budd-Scott v. Daniell, [1902] 2 K.B. 351.

Hart v. Rogers, [1916] 1 K.B. 646.

"Quiet enjoyment" means absence of physical interference with the enjoyment of the premises, not mere disturbance by noise, invasion of privacy, or the like (*Browne v. Flower*, [1911] 1 Ch. 228, *per PARKER, J.* But see *Harmer v. Fumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200, as modified by *O'Cedar v. Slough Trading Co.*, [1927] 2 K.B. 123). *Lavender v. Betts*, [1942] 2 All E.R. 72.

(b) *Swan v. Stransham and Searles* (1566), 3 Dyer, 257 a.

Adams v. Gibney (1830), 6 Bing. 656.

Baynes & Co. v. Lloyd & Sons, *ubi supra*.

(c) *Markham v. Paget*, [1908] 1 Ch. 697.

(d) *Andrews' Case* (1591), Cro. Eliz. 214, approved in *Markham v. Paget*, *ubi supra*.

Matania v. National Provincial Bank, Ltd. and Elevenist Syndicate, Ltd., [1936] 2 All E.R. 633.

(e) *Bandy v. Cartwright* (1853), 8 Exch. 913.

Hall v. City of London Brewery Co., *ubi supra*.

Jones v. Lavington, [1903] 1 K.B. 253, approved in

Markham v. Paget, *ubi supra*.

Budd-Scott v. Daniell, *ubi supra*.

} (aff.).

} (neg.).

It has been the subject of acute controversy whether the employment of the word "demise", or, before the passing of the Real Property Act, 1845 (s. 4), the word "grant", in a lease, created an implied warranty of title to grant the lease. RUSSELL, C.J., in *Baynes & Co. v. Lloyd & Sons*, [1895] 1 Q.B. 820, thought that it did; but his view was repudiated by the Court of Appeal ([1895] 2 Q.B. 610), and, if the authorities quoted by the C.J. are examined, it will be found that the only decision (as distinct from *dicta*) which involves the proposition is the old case of *Holder v. Taylor* (1614), Hob. 12, where the Court of Common Pleas allowed a lessee by "demise" to recover damages against his lessor before eviction. It is curious that the Real Property Act, 1845, should not have included the word "demise" within the scope of section 4, or the L.P.A., 1925, in that of s. 59; and the omission may be claimed as an argument by either party to the controversy. *Quære*: When a term was created by way of use, was there any liability at all on the part of the lessor?

condition or warranty by the lessor in a lease for years that the premises leased are suitable for the purposes for which they are let.^(a) But where a furnished house is let with a view to immediate habitation, and it proves to be uninhabitable, owing to defects in the premises^(b) or otherwise,^(c) the lessee may repudiate the lease, and recover from the lessor any loss which he may have sustained from entering into the transaction.^(d) And where a contract has been made after 2nd December, 1909, for the letting for habitation of a house or part of a house at a rent not exceeding, in London forty pounds, in the case of a house situated elsewhere twenty-six pounds, there will be an implied condition to the effect that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation, and that it will be kept so by the landlord during the tenancy, notwithstanding any stipulation to the contrary.^(e)

(a) *Sutton v. Temple* (1843), 12 M. & W. 52.

Hart v. Windsor (1844), *ibid.* 68.

Keates v. Cadogan (Earl) (1851), 10 C.B. 591.

Lane v. Cox, [1897] 1 Q.B. at p. 417, *per* Lord ESHER, M.R.

Maclean v. Currie (1884), Cab. & El. 361, condition does not apply to merely ordinary defects of repair which can easily be remedied, e.g. cracked plaster of ceiling.

(b) *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336. The condition relates only to the state of the premises at the commencement of the letting, and not that they shall continue fit for habitation throughout the term. The exception does not apply to a furnished flat (*Manchester Bonded Warehouse Co. v. Carr* (1880), 49 L.J. Q.B. 809; *Cruse v. Mount*, [1933] Ch. 278.)

(c) *Smith v. Marrable* (1843), 11 M. & W. 5

Bird v. Lord Greville (1884), Cab. & El. 317 } (Nisi Prius).

(d) *Charsley v. Jones* (1889), 53 J.P. 280

In the last case it was held that to fulfil the condition, it is not enough that the landlord honestly believes the house is in a fit state for habitation; it must in fact be reasonably habitable.

(e) Housing Act, 1936, s. 2 (1). The section does not apply when the letting is for not less than three years certain, upon terms that it is to be made fit for occupation by the lessee, and is not determinable by either party before the expiration of three years.

Summers v. Salford Corpn., [1943] A.C. 283—if the state of repair is such that injury may result from ordinary use, the premises are not fit for human habitation—broken sash cord, held a breach. Only the tenant can sue on the implied undertaking, not his wife or children (*Ryall v. Kidwell & Son*, [1914] 3 K.B. 135, C.A.). The rent referred to is the actual contractual rent paid by the tenant, irrespective of whether he or the landlord pays the rates and the section applies to weekly tenancies and rents, as well as to rents payable over any other periods of time (*Rouson v. Photi* [1940] 2 K.B. 379, C.A.). The section does not impose any obligation on the landlord unless and until he has had notice of the defect which has rendered the dwelling-house not “reasonably fit for human habitation”. (*McCarrick v. Liverpool Corpn.* [1946] 2 All E.R. 646 (H.L.).)

*Repairs by
lessor*

1089. Generally speaking, a lessor is not, in the absence of express contract, bound to effect any repairs or improvements in the premises leased.^(a) But in the case of a letting within the Housing Act 1936, § 1088 *ante*, there is an implied undertaking that the house shall, during the holding, be kept by the lessor in all respects reasonably fit for human habitation.^(b)

(a) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321.

Gott v. Gandy (1853), 2 E. & B. 845.

Davis v. Foots, [1940] 1 K.B. 116, C.A.

(b) Housing Act, 1936, s. 2. The section does not apply to a house let at more than sixteen pounds a year, but not in London or in a borough with a population of 50,000 or upwards, if the contract was made before 31st July, 1923.

*Satisfied
terms*

1090. Where the purposes of a term of years created or limited at any time out of a freehold interest in land become satisfied (whether or not the term either by express declaration or by construction of law becomes attendant on the freehold reversion) it will merge in the reversion expectant thereon and cease accordingly. A similar rule applies to satisfied terms created out of other terms of years, but only when the satisfaction occurred after 1925.^(a) A similar rule applies to a similar term created out of a leasehold interest in land which becomes satisfied after 1925.^(b)

(a) L.P.A., 1925, s. 5 (1).

(b) *Ibid.* s. 5 (2).

This provision was substituted by the L.P.A., for the provisions of the Satisfied Terms Act, 1845, now repealed by the new Act (Sched. VII). It has acquired importance by the provision in s. 86 of the L.P.A., to the effect that a legal mortgage of leaseholds can now only be made by the creation of a sub-term. All mortgage terms, when the moneys secured by them have been discharged, now become satisfied terms, and cease (L.P.A., 1925, s. 116).

1091. Any term, originally for not less than three hundred years, of which at least two hundred years are yet unexpired, and in respect of which no trust or right of redemption exists in favour of the reversioner, and no rent of a money value is actually payable,^(a) may, unless it is liable to be determined by re-entry for condition broken, or is a term created by sub-demise out of a superior term itself incapable of being enlarged into a fee simple,^(b) be enlarged into a fee simple by the owner thereof by deed declaratory to that effect.^(c) *Enlargement
of long terms*

(a) A rent not exceeding one pound *per annum* which has not been paid for a continuous period of twenty years (five having elapsed since 1925) is deemed to have ceased to be actually payable (L.P.A., 1925, s. 153 (4)).

(b) *Ibid.* (2).

(c) *Ibid.* (6).

The fee simple becomes subject to the same trusts, powers, executory limitations over, and all other obligations and liabilities as was, prior to its enlargement, the term itself (*ibid.* (8)). It will include the unsevered minerals (*ibid.* (10)).

TITLE IV—ESTATES AT WILL

It seems to be doubtful whether a so-called "estate at will" can now be classed as a legal interest for there is no certainty that they will last any period at all, and in the L.P.A., s. 54, the expression 'interests at will'. But, as it can be terminated at any time by either party, the question is of little practical importance; and conveniently classes it among such interests.

Estate at will

1092. An estate at will is a possession of land by a person with the permission of another person entitled to a present interest therein, upon the term that either party may put an end to the estate at any time.

Co. Litt. 55 a.

Taylor v. Ashe (1633), Vin. Abr. 396.

Blunden v. Baugh (1633), Cro. Car. at p. 303-4, *per Curiam*.

It may well be doubted whether a so-called "estate at will" is really an estate at all; but it is often described as such. No fealty owed by the tenant in respect of it; and a rent reserved out of it though it may be distrained for, is not rent service (Co. Litt. 57 b). No remainder can be limited on a so-called estate at will (*Stafford (Lord) Case* (1609), 8 Co. Rep. at 75 a); and, neither before nor since the passing of the Juries Act, 1825, has such an estate been a qualification for jury service (32 Hen. VIII (1540) c. 9, s. 3; 2 Eliz. (1585) c. 6, s. 1; Juries Act, 1825, ss. 1, 50, 52). On the other hand, the doctrine that a tenant is estopped from denying his lord's title (*ante*, § 1037 (iv)) applies to a tenancy at will (*Morton v. Woods* (1869), L.R. 4 Q.B. 293); and a tenant at will can take the reversion on his estate by release (Co. Litt. 270 b). It was the practice of some of the older writers (e.g. Blackstone) to class all copyhold estates as estates at will; but as the copyholder had long been protected by the King's Courts from arbitrary ejectment by his lord, this classification was manifestly untenable. With the abolition of copyhold tenure, the practice has ceased to have any importance.

How created

1093. A tenancy at will is created—

- (i) by entry under an express agreement for a tenancy at the will of the lessor or the lessee,^(a) or for an indefinite period (unless a freehold interest is created);^(b)

- (a) Litt. s. 68.
Co. Litt. 55 a.
Taylor v. Ashe (1633), Vin. Abr. 396.
- (b) *Anon.* (1577), 4 Leon. 33, *per* MANWOOD, J.
Cadee's and Oliver's Case (1587), 3 Leon. 153.
Bishop of Bath's Case (1605), 6 Co. Rep. at p. 35 b.
Blamford v. Blamford (1615), 3 Bulst. 98.
Anderson v. Midland Railway Co. (1861), 3 E. & E. 614.

If it is clear from the facts, that the parties intended to create a tenancy at will, the circumstance that a definite term of years is mentioned will not affect the character of the tenancy (*Morton v. Woods* (1869) L.R. 4 Q.B. 293). On the other hand, an express tenancy "from year to year" will not be converted into a tenancy at will, merely because it contains a power enabling the lessor to put an end to it at any time (*Re Threlfall, Ex parte Queens Benefit Building Society* (1880), 16 Ch. D. 274). But the rule that an indefinite grant (not being of a freehold) creates an estate at will, does not hold against the Crown; a Crown grant of that nature being void for uncertainty (*Alton Woods' Case, A.-G. v. Bushopp* (1600), 1 Co. Rep. at p. 43 b).

- (ii) by entry under a lease for so many years as a third person shall name—until such third person has named the term ;

Bedford v. Johnson (1659), 2 Sid. 153.

Semble : There was no *interesse termini* before entry (see *ante* §1052).

- (iii) by entry, under a void title, upon the land of another, followed by an acquiescence of that other after knowledge of the entry ;

Litt. s. 70.

L.P. Act, 1925, s. 54.

Blunden v. Baugh (1633), Cro. Car. at p. 303, *per Curiam*.

Denn d. Warren v. Fearnside (1747), 1 Wils. 176.

Smith v. Widdlake (1877), 3 C.P.D. 10.

- (iv) by a holding over of a tenant, with the acquiescence of the landlord, after the expiry of the tenant's interest ;

Barham v. Hayman (1559), 2 Dyer, 173 a.

Bedford v. Johnson, ubi supra.

Bowe's Case (1670), 10 Vin. Abr. 400.

Turner v. Doe d. Bennett (1842), 11 L.J. (Ex.) 453.

Acceptance of rent by the lessor, in either of the last two cases, at any rate if the rent is accepted for any aliquot part of a year, converts the tenancy into a tenancy from year to year (*Wood v. Beard* (1876), 2 Ex. D. 30 ; *ante*, § 1064 (iv)).

- (v) by the occupation of a mortgagor, with the

consent of the mortgagee, under a mortgage by which a legal estate in the land passes to the mortgagee ;

Powseley v. Blackman (1623), 2 Roll. Rep. 284.

Freeman v. Barnes (1670), 1 Sid. at p. 460, *per Curiam*.

Holland v. Hatton (1697), Carth. 414.

Keech v. Hall (1778), 1 Doug. K.B. 21.

There appears at one time to have been a good deal of doubt whether the relation of lessor and tenant at will was created between a mortgagee and a mortgagor by the mere occupation of the mortgaged premises by the latter without any attornment or tenancy clause (see the remarks of BULLER, J., in *Birch v. Wright* (1786), 1 Term Rep. at p. 383 ; of PATTESON, J., in *Doe d. Jones v. Williams* (1836), 5 Ad. & El. at p. 297 ; of BEST, C.J., in *Doe d. Fisher v. Giles* (1829), 5 Bing. at pp. 426-7 ; and of Lord DENMAN, C.J., in *Doe d. Higginbotham v. Barton* (1840), 11 Ad. & El. at p. 314). On the other hand, it seems quite clear that, as against a stranger, the mortgagee may treat the mortgagor in possession as his tenant (*Partridge v. Berri* (1822), 5 B. & Ald. 604 ; *Hitchman v. Walton* (1838), 4 M. & W. 409 ; both approved in *Doe d. Higginbotham v. Barton*, *ubi supra*). It would seem, then, that it was at the option of the mortgagee to treat the mortgagor in possession as a tenant at will or as a mere tenant on sufferance. But modern legislation, which has conferred many rights of dealing with the property on the mortgagor, is certainly against the presumption that he is a wrongdoer ; and the statement in the text probably represents the modern view. It would seem, however, that, in order to constitute a tenancy at will, there must be an actual recognition by the mortgagee of the mortgagor's holding (*Scobie v. Collins*, [1895] 1 Q.B. 375). And a mere covenant by the mortgagee that he will not take any of the profits of the land until default, does not, of itself, create a tenancy at will in the mortgagor (*Powseley v. Blackman*, *ubi supra*). In *Sands to Thompson* (1883), 22 Ch. D. at p. 616, it was said by the Court, that a mortgagor who had paid off the mortgage without taking a reconveyance was a tenant at will to the mortgagee. *Sed quære*. It does not seem that the new law requiring all legal mortgages to be effected by demise or charge (L.P.A., 1925, s. 85 (1)) has affected the question, except that it has made it logically difficult to argue that the mortgagor can be both landlord and tenant of his mortgagee. See *Fisher & Lightwood, Law of Mortgage*, 7th Ed., 377 ; *Coote, on Mortgages*, 9th Ed., Vol. I, 679.

- (vi) by the occupation by a *cestui que trust*, with the permission of the trustee in whom the legal estate in the land is vested ;

Freeman v. Barnes, *ubi supra* (so taken in *Garrard v. Tuck*).

Pomfret (Earl) v. Windsor (Lord) (1752), 2 Ves. Sen. at p. 481, *per* HARDWICKE, C.

Garrard v. Tuck (1849), 8 C.B. at p. 250.

Melling v. Leak (1855), 16 C.B. 652.

Before 1940, the possession of a *cestui que trust* could be adverse to the trustee so as to permit time to run in favour of the former *prima facie*, a *cestui que trust* in actual possession was deemed to be a tenant at will of the trustee (*Garrard v. Tuck*, *supra* p. 252). Now see Limitation Act, 1939, s. 7 (5).

- (vii) by the admission to possession of the land, with the consent of the vendor, of a person who has contracted to purchase an interest in or take a lease of the land, pending completion of the contract.

Hamerton v. Stead (1824), 3 B. & C. at p. 483, *per* LITLEDALE, J.

Saunders v. Musgrave (1827), 6 B. & C. 524.

Ball v. Cullimore (1835), 2 Cr.M. & R. 120.

Howard v. Shaw (1841), 8 M. & W. 118.

Coatsworth v. Johnson (1886), 55 L.J. (Q.B.) 220; 54 L.T. 520.

Care must be taken to distinguish between a tenant at will and a servant occupying his master's property (*Mayhew v. Suttle* (1854), 4 E. & B. 347 (public-house manager); *White v. Bayley* (1861), 10 C.B. (N.S.) 227 (Society's manager)).

1094. A tenancy at will is determined by—

*Termination
of tenancy
at will*

- (i) a demand of possession on the part of the lessor, communicated to the lessee ;

Co. Litt. 55 b.

Doe d. Nicholl v. M'Kae (1830), 10 B. & C. 721.

Doe d. Tomes v. Chamberlaine (1839), 5 M. & W. 14.

- (ii) an entry on the land by the lessor, without the assent of the lessee ;

Co. Litt. 55 b.

Doe d. Tomes v. Chamberlaine, *ubi supra*, *per* PARKE, B.

Unless the entry is for the purpose of doing an act which the lessor is entitled to do without putting an end to the tenancy (Co. Litt. 55 b).

- (iii) an attempted assignment or under-letting of his interest by the lessee, of which the lessor has notice ;

Birch v. Wright (1786), 1 Term Rep. 378.

Pinhorn v. Souster (1853), 8 Exch. 763.

Melling v. Leak (1855), 16 C.B. at p. 669, *per Curiam*.

(iv) the death of the lessor or the lessee ;

Co. Litt. 57 b, 62 b.

Scobie v. Collins, [1895] 1 Q.B. 375.

Even if the lease was expressly worded to hold to the lessee and his heirs at the will of the lessor, the lessee's heir was a trespasser if he entered (Litt. s. 82). Outlawry of either party was said also to determine the tenancy (*Oland's Case* (1602), 5 Co. Rep. 116 a). But outlawry in civil proceedings has been abolished (Civil Procedure Acts Repeal Act, 1879, s. 3).

(v) any other act of the lessor or the lessee, which comes to the knowledge of the other party, and which shows an intention to put an end to the tenancy.

Dunsdale (Dinsdale) v. Isles (1673), 3 Keb. 166, 207.

The hardships involved in this last rule, in the case of tenancies at a rent, were so obvious, that the Courts at an early date attempted to lay it down that certain reasonable restrictions must be imposed upon it, e.g. that a tenant must not determine his tenancy just before rent becomes due (*Anon.* (1505), Keil. 65). But the tendency, previously referred to (§ 1064 (ii)), to treat any payment and acceptance of rent for an aliquot part of a year as evidence of a tenancy from year to year, which is manifest as early as *Agard v. King* (1600), Cro. Eliz. 775, has put an end to many of these refinements. The Apportionment Act, 1870, by making rent accrue from day to day, has removed other difficulties. A summary of the old restrictions laid down to enforce "reasonableness" will be found in Viner, *Ab.* X, pp. 406-7. For the question when, despite the general rule to the contrary, a tenant at will's possession becomes adverse to his lessor, see *post*, § 1109.

(vi) The tenant committing an act of voluntary waste.

Co. Litt. 57 a.

*No notice to
determine*

1095. No previous notice of his intention to terminate a tenancy at will need be given either by the lessor or the lessee.^(a) But the lessor cannot recover in Ejectment against the lessee, unless the tenancy has been already determined. This latter

rule has no application to a mortgagee seeking to eject the mortgagor from the mortgaged premises.^(b)

(a) *Doe d. Fisher v. Giles* (1829), 5 Bing. 421 (assumed).

(b) *Hitchman v. Walton* (1838), 4 M. & W. at pp. 414, 415, *per* Lord ABINGER, C.B., and PARKE, B.

1096. If a certain rent is reserved on the creation of a tenancy at will, the lessor may distrain for rent in arrear. *Rent may be distrained for*

Litt. s. 72.

Co. Litt. 57 b.

Anderson v. Midland Railway Co. (1861), 3 E. & E. 614.

Coke (Co. Litt. 57 b) and, following him, Blackstone (*Comm.* II, 146) state, that if the lessor impounds the distress on the land, the tenancy at will is determined. *Sed quære.* See Distress for Rent Act, 1737, s. 10.

1097. A tenant at will is entitled to the profits of the land, including reasonable housebote (*post*, § 1249). *Tenant at will entitled to profits*

Y.B. 12 Edw. IV (1473), Pasch. pl. 20, *per* CHOKE, J.

R. v. Winter (1705), 2 Salk. 588, *per* POWELL, J.

Doe d. Bennett v. Turner (1840), 10 L.J. (Ex.) 213.

Trent v. Hunt (1853), 9 Exch. 14.

1098. A tenant at will whose tenancy is determined by some uncertain event not caused by himself is entitled to emblements, or the statutory substitute therefor (§ 1250), in the same manner as a tenant for life in similar circumstances.^(a) This rule has no application to a mortgagor occupying the mortgaged premises with the consent of the mortgagee.^(b) *And emblements*

(a) Litt. s. 68.

Co. Litt. 55.

Landlord and Tenant Act, 1851, s. 1.

(b) *Barden's and Witherington's Case* (1587), 2 Leon. 54.

Keech v. Hall (1778), 1 Doug. K.B. at p. 22, *per* Lord MANSFIELD, C.J.

Moss v. Gallimore (1779), 1 Doug. K.B. at p. 283, *per* BULLER, J.

Birch v. Wright (1786), 1 Term Rep. at p. 383, *per* BULLER, J.

Doe d. Fisher v. Giles (1829), 5 Bing. at p. 427, *per* BEST, C. J.

The tenant at will of a house, who is put out by his lessor, is entitled, within a reasonable time, to remove his goods (Litt. s. 69).

*May bring
trespass and
ejectment*

1099. A tenant at will may maintain the actions of Trespass^(a) and Ejectment^(b) against strangers (*ante*, §§ 798, 813), if his possession of the land is wrongfully interfered with or taken from him.

(a) *Geanes v. Portman* (1594), Cro. Eliz. 314.

(b) *Blunden v. Baugh* (1633), Cro. Car. 305, *per* JONES, BERKELEY, and CROKE, J. J., quoting *Spark v. Spark* (1559-60), which was, however, a copyhold case. It seems that the lessor at will can also bring Ejectment (*Geary v. Bearcroft* (1666), 1 Sid. 346. But there the tenant at will was a *cestui que trust* of the lessor).

*Liable for
voluntary
waste*

1100. A tenant at will is not liable for permissive waste, although if he commits voluntary waste his tenancy is thereby determined, and he is liable to an action for damages (*post* § 1319).

Litt. s. 71.

Co. Litt. 57 a.

Shrewsbury's (Countess) Case (1600), 5 Co. Rep. 13 b.

Harnett v. Maitland (1847), 16 M. & W. 257.

*Alienation
by tenant
at will*

1101. It is doubtful whether an attempted alienation of his interest by a tenant at will vests anything in the alienee.

Broughten's Case (1482), Y.B. 22 Edw. IV., fo. 5, pl. 16, *per* BRIAN J. Co. Litt. 57 a.

Anon. (undated), 1 Brownl. 43.

Murphy v. Ford (1855), 5 I. C.L.R. 19.

The argument seems to be, that an alienation by a tenant at will is a determination of his will. But an assignment is not a determination, unless the lessor has notice of it (*Carpenter v. Collins* (1605), Yelv. 73; *Pinhorn v. Souster* (1853), 8 Exch. 763, *ante*, § 1094 (iii)). It was held in *Rouses Case* (1587), Owen, 27; *Blunden v. Baugh* (1633), Cro. Car. at p. 304; and *Doe d. Goody v. Carter* (1847), 9 Q.B. 863, that a lease for years or at will by a tenant at will was binding on all persons but the original lessor.

TITLE V—ESTATES AT SUFFERANCE AND ADVERSE POSSESSION

1102. A tenant at sufferance is a person who, *Tenant at sufferance* having lawfully entered upon land in pursuance of a title by act of the parties, continues in possession thereof after his title has expired, without claim of right, and without the agreement of the person entitled to possession.^(a) There cannot be a tenant at sufferance of the Crown.^(b)

(a) Co. Litt. 57 b.

Zouche's (Lord) Case (1543), Dyer, 57 b.

Anon. (1571), Owen, 35. (In this case it was suggested that a tenant *pur autre vie* holding over was not a tenant at sufferance, but an intruder. See, however, the next two cases.)

Rouses Case (1587), Owen 27.

Allen v. Hill (1591), Cro. Eliz. 238.

Geary v. Bearcroft (1666), Cart. at p. 66, *per* BRIDGMAN, C. J.

Thomassin v. Mackworth (1666), *ibid.* at p. 78, *per eundem*.

Smarle v. Williams (1694), 1 Salk. at p. 246, *per* HOLT, C. J.

(b) *Finch's Case* (1590), 2 Leon. at p. 143, *per* CLARK, B.

It is doubtful whether the interest of a tenant at sufferance should be classed as a legal estate; the L.P.A., 1925, s. 2, does not enumerate it among such interests, nor is such an interest included in the "definition" of a term of years absolute contained in s. 205 (1) (xxvii). Though an attempt by the tenant to alienate it puts an end to it (§ 1104), it is presumed that the doctrine of estoppel by tenure (*ante*, § 1037 (iv)) applies to the parties. Moreover, the facts that such a holding easily develops into a tenancy from year to year, which is (or may be) a legal estate, and that it depends upon possession suggest that it may be legal.

1103. A tenant at sufferance has no right to the *No profits* profits of the land;^(a) but he cannot be treated as a trespasser.^(b) He may bring Trespass against a stranger,^(c) and may recover in ejectment against a mere wrongdoer.^(d)

(a) *Anon.* (1502), Keil. 47 a, *per* FROWIKE, C. J.

Pike and Hassen's Case (1588), 3 Leon. 233, *per* WRAY, C. J.

Doe d. Bennett v. Turner (1840), 7. M & W. at p. 235, *per* PARKE, B.

(b) Co. Litt. 57 b.

Rouses Case (1587), Owen, 27, *per Curiam*.

Trevillian v. Andrew (1698), 5 Mod. Rep. 384.

Because he entered lawfully.

- (c) *Graham v. Peat* (1801), 1 East, 244. There seems to be a little doubt on this point. In *Rouses Case*, *ubi supra* (also reported 2 Leon. 45), the Court was divided in opinion whether a tenant at sufferance could justify distraining the beasts of a stranger, damage feasants. And it was said in *Preston v. Love* (1607), Noy, 120, that the reversioner might lease to another without entry on the tenant at sufferance; "for it is not out of his possession". But the report is bad.

- (d) *Perry v. Glissold*, [1907] A.C. 73, P.C.

*No power of
alienation*

1104. If a tenant at sufferance attempts to dispose of his interest, or to create estates out of it, his possession becomes adverse.

Rouses Case, *ubi supra*, at p. 28, *per totam Curiam*.

This rule was of great importance before 1833 (Real Property Limitation Act, 1833, s. 39), owing to the effect produced on the claims of rightful owners by a "descent cast", i.e. the transmission of a tortious fee, gained by disseisin, to the heir of the disseisor (*Anon.* (1571), Owen, 35). And, even now, the point is important; regard being had to the great unwillingness of the Courts to allow a title by adverse possession to be claimed by a lessee against his lessor (*Archbold v. Scully* (1861), 9 H.L.Cas. at p. 375, *per* Lord CRANWORTH; *Walter v. Yalden*, [1902] 2 K.B. 304, and *post*, § 1109).

*Use and
occupation*

1105. No rent can be claimed, as such, from a tenant at sufferance;^(a) but an action for use and occupation will lie against him.^(b) If the person entitled to possession accepts rent, as such, from a tenant at sufferance, the latter becomes a tenant at will.^(c)

- (a) *Anon.* (undated), 1 Brownl. 30.

Whitgift v. Barrington (1622), Winch at p. 32, *per* WINCH, J.

- (b) *Bromfield v. Williamson* (1654), Sty. 407.

Bayley v. Bradley (1848), 5 C.B. 396.

Leigh v. Dickeson (1884), 15 Q.B.D. 60. But only by waiving the tort, and, therefore, only up to the date of notice in ejectment (*Birch v. Wright* (1786), 1 Term Rep. at p. 387, *per* BULLER, J.).

This rule, about which there is some little doubt, lost much of its importance by the passing of the Landlord and Tenant Act, 1730, s. 1, which provides the superior remedy described in the next paragraph. But there may be some cases which do not fall within the statute.

- (c) *Anon.* (1573), 4 Leon. 35.
Green's and Moody's Case (1627), Godb. 384.
Taylor v. Seed (1696), Comb. 383.

It may be converted into a yearly or other periodic tenancy in the usual way, e.g. if rent is paid and accepted by reference to a year. (*Dougal v. McCarthy*, [1893] 1 Q.B. 736.)

If the tenant claims an interest for a specific number of years, acceptance of rent admits his claim (*Green's and Moody's Case*, *ubi supra*, subject, however, now, presumably, to the L.P.A., 1925, ss. 3, 54).

The tenancy requires no notice to determine it; the landlord may enter, and the tenant may leave, at any time without notice. (*Doed v. Bennett v. Turner* (1840), 7 M. & W. 226, 235.)

1106. Any tenant for term of life, lives, or years, *Holding over* for any person coming into possession through such tenant, who wilfully holds over any land after the determination of such term, and after demand of possession and notice in writing by the person entitled to possession, or his agent, is liable to pay double the yearly value of such land to the person so kept out of possession, for so long as such land is detained.

Landlord and Tenant Act, 1730, s. 1.

1107. A tenant at sufferance is liable to the person *Liability for damage* entitled to possession of the premises for all damage done by him to the premises; but (*semble*) not for permissive waste.

West v. Treude (1630), Cro. Car. 187. But this was more like a tenancy at will.

1108. A person who takes possession of land *Adverse possession* claiming to hold it as his own, acquires an interest valid as against all persons other than those legally entitled, mediately or immediately, to possession.

Asher v. Whitlock (1865), L.R. 1 Q.B. 1.
Perry v. Glissold, [1907] A.C. 73.

Of course there is no tenure between the adverse possessor and the dispossessed owner; nor will the doctrine of estoppel (§ 1037 (iii)) apply between them. But, if not an actual estate, the interest of the adverse possessor is, potentially, so valuable, owing to the operation of

the Limitation Act, 1939, that a somewhat careful account of it is desirable.

*Limitation
Act*

1109. For the purposes of the Limitation Act, 1939, the possession of a person who claims under a lease is not adverse to the lessor during the existence of the term ; even though no rent is paid and no acknowledgment given by the person in possession.^(a) And a person who acquires possession against a lessee does not acquire adverse possession against the lessor until the expiry of the lease ; even though no rent is paid or acknowledgment given by such person.^(b) But the possession of a tenant at will becomes adverse to his lessor either at the actual determination of his tenancy, or at the expiration of one year from the commencement thereof whichever first happens.^(c)

(a) *Archbold v. Scully* (1861), 9 H.L.Cas. at p. 375, *per* Lord Cranworth.

(b) Limitation Act, 1939, s. 6.

Walter v. Yalden, [1902] 2 K.B. 304. This case is very strong because the owner of the term had surrendered it to the lessee more than twelve years before the action was brought.

Taylor v. Twinberrow, [1930] 2 K.B. 16.

(c) Limitation Act, 1939, s. 9 (1).

*Liabilities
of adverse
possessor*

1110. The effect of adverse possession is to destroy the title of the former owner. It does not destroy the titles of other persons who have enforceable interests in the land, such as the owners of easement and restrictive covenants, for no right of action accrues to them until there has been an interference with their particular interests. A squatter without notice is not a purchaser without notice.

Re Nisbet and Potts' Contract, [1906] 1 Ch. 386.

*Possession
must be
effective*

1111. Possession without title, to be adverse must be effective in respect of all parts of the land in respect of which it claimed to be adverse.

Ashton v. Stock (1877), 6 Ch. D. 719.

Thompson v. Hickman, [1907] 1 Ch. 550.

Glyn v. Howell, [1909] 1 Ch. 666.

1112. Adverse possession may be transferred and transmitted, both before as well as after the right of the owner or former owner is barred by lapse of time, in the same manner as a lawful estate.^(a) But if a person holding possession without title abandons such possession, the statutory period of limitation will cease to run against the owner, and will recommence *de novo* on the taking of possession by another adverse possessor.^(b) *Transfer of adverse possession*

- (a) *Doe d. Goody v. Carter* (1847), 9 Q.B. 863.
Asher v. Whitlock (1865), L.R. 1 Q.B. 1.
Re Nisbet and Potts' Contract, [1906] 1 Ch. 386.
- (b) *Trustees, Executors and Agency Co., Ltd. v. Short* (1888), 13 App. Cas. 793, P.C.
 Limitation Act, 1939, s. 10 (2).

1113. A person who takes and holds possession of land without title, whether he acted in good faith or not, is liable, on ejectment by the person entitled to possession, to account for the mesne profits (*ante*, §§ 1033, 1034) arising during his possession. But if he has acted reasonably and in good faith, he will be allowed credit for all necessary expenses incurred in taking such profits. *Mesne profits*

- Goodtitle v. Tombs* (1770), 3 Wils. 118.
- Martin v. Porter* (1839), 5 M. & W. 351.
- Jegon v. Vivian* (1871), 6 Ch. App. 742.
- Ashton v. Stock* (1877), 6 Ch. D. 719.

Jegon v. Vivian shows, that the fact that the defendant knew that there was a doubt on the title, does not prevent him claiming the allowance of expenses on the ground of *bonâ fides*. *Quære* : does the main doctrine of the paragraph apply to anything except a trespass ? Certainly under the old law mesne profits could not be recovered in Ejectment, but only by a supplementary action of Trespass. See, however, the reasons given for this peculiarity by WILMOT, C.J., in *Goodtitle v. Tombs*, *ubi supra*.

TITLE VI—LEGAL INTERESTS LESS THAN ESTATES (INCORPOREAL HEREDITAMENTS)

*Incorporeal
hereditaments*

1114. Incorporeal hereditaments are such interests in land as, though, *primâ facie*, binding on all persons and treated as real property, are of a strictly limited character, and do not confer upon their owners (except as a temporary remedy) possession of the land as of right. The only incorporeal hereditaments capable of existing as legal interests are (a) franchises, (b) profits, (c) easements, (d) rent-charges in possession issuing out of or charged on land, (e) charges by way of legal mortgage (*post*, §§ 1368, 1369), (f) land tax, and any other similar charge on land not created by an instrument,^(a) (g) rights of entry exercisable over or in respect of a legal term of years absolute or annexed for any purpose to a legal rent-charge ("purely incorporeal hereditaments"). And, of these, rent-charges, franchises, profits, and easements are only capable of existing as legal interests when they are held for an interest equivalent to an estate in fee simple (or in perpetuity) absolute in possession or for a term of years absolute.

L.P.A., 1925, s. 1 (2).

- (a) Tithe rent charge was formerly expressly mentioned here. It has been converted into a tithe redemption annuity by the Tithe Act, 1936, s. 3, and although not expressly stated to be a legal interest, it falls within that category, as being a "similar charge on land not created by an instrument".

The importance attributed by the common law to seisin, i.e. possession, of freehold land, naturally reflected itself in the law which gradually grew up as the possibility of severing certain of the normal rights of a possessor of land from the rest of his rights and vesting them in another person or persons, was realized. Many of these rights were extremely valuable, and were protected by legal process from early times. An attempt was even made to apply to them a doctrine of

quasi-seisin, e.g. by treating receipt of profits or recognition of title as equivalent to seisin. But, of course, the differences between corporeal possession and artificial possession of this kind are insurmountable, and, naturally, led to different results.

1115. A purely incorporeal hereditament is an interest in land of a limited and definite character, by virtue whereof the owner of such incorporeal hereditament has the right, not merely as against the occupant of the land, but as against persons generally, to do some specific act or acts on, over, or affecting such land, or to require the occupant of such land to do or refrain from doing some specific act or acts which, but for such right, the occupant of such land would be entitled to refrain from doing or to do. *Purely incorporeal hereditament*

The term "purely incorporeal hereditaments" is, it is believed, unofficial. But some phrase of this kind is, it is suggested, necessary to distinguish the classes of rights dealt with in this Title, which may exist as legal interests, from other classes of incorporeal hereditaments (e.g. life, entailed, and future interests) which, since the taking effect of the L.P.A., 1925, can only exist as equitable interests, and are, obviously, very different in character from the older classes of incorporeal hereditaments. The definition of "incorporeal hereditaments" (generally), given in § 1114, is also unofficial; but it is based on what is believed to be the historic distinction between corporeal and incorporeal hereditaments.

1116. The category of purely incorporeal hereditaments may alter and expand with the changes that take place in the circumstances of mankind, but incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner. *New kinds*

Dyce v. Hay (Lady) (1852), 1 Macq. 305, at pp. 312, 313.

Keppell v. Bailey (1834), 2 My. & K. at p. 535, *per* BROUGHAM, C.

Ackroyd v. Smith (1850), 10 C.B. at p. 188, *per* Curiam.

Hill v. Tupper (1863), 2 H. & C. at p. 127, *per* POLLOCK, C.B.

Sports and General Press Agency v. "Our Dogs" Publishing Co., Ltd., [1917] 2 K.B. 125. (An inclusive right to take photographs, is not a right of property known to the law.)

It might appear from the language employed in the above cases, e.g., POLLOCK, C.B., in *Hill v. Tupper* at p. 127, "A new species of incorporeal hereditament cannot be created at the will and pleasure of

the owner of property ; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament ” ; that a new species of incorporeal hereditament or a new species of burden cannot be created and given the status and legal effect of an easement. The true meaning appears to be, that a right over another’s land cannot be an easement unless it falls within the general characteristics of an easement, which though difficult to define, are generally agreed to be as follows : (1) there must be a dominant and a servient tenement ; (2) these tenements must not be both owned and occupied by the same person ; (3) the right must accommodate the dominant tenement, and, (4) it must be capable of forming the subject matter of a grant. It is true that a profit may exist without a dominant tenement, but subject to this, easements and profits must comply with the above requirements. “ It is a fallacy to suppose that every easement must be brought within some particular class which has been recognised, such as watercourses, or light or air ” ; *per* Lord HERSHELL, C., in *Simpson v. Godmanchester Corpn.*, [1896] 1 Ch. at p. 219. A right which fails to satisfy one of the essential requirements may be a valid licence, and there is no objection to the creation of novel contractual rights over land which bind only the parties. Under the modern doctrine of restrictive covenants binding on purchasers with notice (and registration under the L.C.A., 1925, s. 10, is notice), (L.P.A., 1925, s. 198) ; and by the doctrine of non-derogation from grants protection is afforded to legitimate interests which cannot be brought within the requirements of easements. Examples of rights which are inadmissible as easements are unobstructed view, privacy, publicity, a *jus spatiant*. or the right to use land for enjoyment, and probably a right involving the owner of the servient tenement in the expenditure of money (other than the spurious easement of fencing). The Courts have recognised as an easement the right to go upon the land of another to open sluice gates (*Simpson v. Godmanchester Corpn.* (*supra*)) and to place store and casks upon land reclaimed from the sea (*A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.*, [1915] A.C. 599) See *Cheshire, M.R.P.*, pp. 227-238 ; *Megarry, Manual of Real Property*, pp. 420-424.

*Interests in
incorporeal
heredita-
ments*

1117. Purely incorporeal hereditaments (not being advowsons^(a)) are not the subject of tenure and no estates can be created in them. But—

- (i) interests analogous to estates can be created in purely incorporeal hereditaments, without technical words, in accordance with the intention of the parties ;^(b) and, generally speak

ing, such interests, both as to the construction put upon them, and the respective rights and liabilities of successive owners against or towards one another,^(c) will be governed by the rules affecting analogous limitations of estates ;

- (a) Co. Litt. 85 a.
Hartopp and Cock's Case (1627), Hut. 88.
- (b) Co. Litt. 20 a.
Nevil's Case (1604), 7 Co. Rep. at 33 a (tail).
Moore v. Plymouth (Earl) (1817), 7 Taunt. 614 (tail).
Davis v. Morgan (1825), 4 B. & C. 8 (years).
Hewlins v. Shippam (1826), 5 B. & C. 221 (fee simple).
Wood v. Leadbitter (1845), 13 M. & W. at p. 843.
Booth v. Alcock (1873), 8 Ch. App. 663 (years).
Pym v. Harrison (1876), 33 L.T. 796 (life).
McManus v. Cooke (1887), 35 Ch. D. 681 (fee simple).
Dynevor (Lord) v. Tennant (1888), 13 App. Cas. 279 (fee simple).
Rymer v. McIlroy, [1897] 1 Ch. 528 (fee simple).
Fitzgerald v. Firbank, [1897] 2 Ch. 96 (years).
Grove v. Portal, [1902] 1 Ch. 727 (years).

No rent service can, however, be reserved by a subject out of an incorporeal hereditament (Co. Litt. 47). And even a contractual rent made payable on a grant for life of an incorporeal hereditament was unenforceable at common law (*ibid.*). The action of Debt was extended to the latter case by the Landlord and Tenant Act, 1709, s. 4.

- (c) The opportunities open to the limited owner of an incorporeal hereditament of committing waste at the expense of his successors in title are, from the nature of the case, small. But it is laid down by Coke (Co. Litt. 53 a) that if the "tenant" of a franchise makes an excessive use of his rights, he will be liable for waste; and though in *Moyle's Case* (undated) Noy, 70, it was said that destroying coney-burrows is not waste, it is generally assumed that this *dictum* does not apply to a legal warren by charter or prescription (*Lurting v. Conn* (1850), 1 I. Ch. R. at p. 276). The doctrine, countenanced by *Smarle v. Penhallow* (1703), 1 Salk. 188, to the effect that, on the death of the owner of an interest *pur autre vie* in an incorporeal hereditament, no special occupant being named in the grant, the interest would come to an end, because there could not be a general occupancy of an incorporeal hereditament, was definitely overruled by the Court of Common Pleas in *Bearpark v. Hutchinson* (1830), 7 Bing. 178. It is clear that such an interest can be devised under the Wills Act, 1837, s. 3. Though it seems to have been only recently that the Rule against Perpetuities has been held to apply to incorporeal hereditaments (see Gray, *Perpetuities*, §§ 314-16) there can be no doubt that it does now apply

(*Edwards v. Edwards*, [1909] A.C. 275), and so, presumably, did the so-called Rule against Double Possibilities (*post*, § 1272) in the case of limitations created before 1926 (L.P.A., 1925, s. 161 (c)). But it must be carefully remembered, that the Rule against Perpetuities restricts only the commencement, not the continuance, of the interest (*South Eastern Rly. Co. v. Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12). There seems to be no reason why the principle of Merger (*Carnarvon (Earl) v. Villebois* (1844), 13 M. & W. 313) should not apply to successive interests in incorporeal hereditaments; but, presumably, there could be no failure of a contingent interest in such a subject-matter, on the ground of the failure of the particular interest; because no such failure could cause an abeyance of seisin. When an incorporeal hereditament is let by the year, or from year to year, the lessee is only entitled to reasonable notice to quit, not to six months' notice (*Lowe v. Adams*, [1901] 2 Ch. 598). Easements and profits cannot, strictly, be either excepted or reserved *de novo* on a conveyance of the servient tenement; for such incorporeal hereditaments do not exist at the time of the grant, and therefore cannot be excepted, nor do they issue out of the land, therefore they cannot be reserved (Co. Litt. 47 a; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. at p. 743). But, if the deed is executed by the grantee, such an exception or reservation may operate as a grant by him of the incorporeal hereditament (*Wickham v. Hawker* (1840), 7 M. & W. at p. 76, *per* PARKE, B; *Dynewor (Lord) v. Tennant* (1888), 13 App. Cas. 279). And (*semble*) if mentioned in a signed contract, will bind in equity (*May v. Belleville*, [1905] 2 Ch. 605). The L.P.A., 1925, s. 65, only applies to legal estates.

- (ii) subject to § 1119, a purely incorporeal hereditament which, by act of the parties, becomes vested in the owner or occupier for the time being of the land on, over, or in respect of which it is exercisable, in the same right as that in which he holds such land, will be extinguished or suspended for the benefit of such owner or occupier;

Litt. ss. 558–61.

Co. Litt. 313.

Nelson's Case (1585), 3 Leon. 128.

Tyrringham's Case (1584), 4 Co. Rep. 36 b.

Bradshaw v. Eyre (1597), Cro. Eliz. 570.

R. v. Hermitage (Inhabitants) (1692), Carth. 239.

James v. Plant (1836), 4 Ad. & El. at p. 761, *per Curiam*.

Ecclesiastical Commrs. for England v. Kino (1880), 14 Ch. D. 213.

Richardson v. Graham, [1908] 1 K.B. 39.

In order that the incorporeal hereditaments may be extinguished,

and not merely suspended, the estates of the servient owner in both tenements must be not merely in the nature of a fee simple, and in the same right, but equally "perdurable" (*R. v. Hermitage (Inhabitants)*, *ubi supra*, at p. 241, *per Curiam*; *Thomas v. Thomas* (1835), 2. Cr. M. & R. 34). And there must be no derivative estate, the enjoyment of which would be injured by the extinction (*Richardson v. Graham*, *ubi supra*). The L.P.A., 1925, does not, apparently, affect the rule (secs. 201 (1) of that Act).

- (iii) any real estate consisting of any interest in a purely incorporeal hereditament which, by reason of the death intestate and without an heir of the owner thereof, cannot be claimed by any beneficial successor, will pass to the Crown as *bona vacantia*, notwithstanding any devise to trustees by the late owner.*

A.E.A., 1925, s. 46 (1) (vi), escheat being abolished; *ibid.* s. 45 (1) (d).

Re Wood, [1896] 2 Ch. 596.

Re Bond, Paves v. A.-G., [1901] 1 Ch. 15.

1118. A purely incorporeal hereditament is said *Appendant* to be "appendant" when, by a general rule of law, the title to it is, in the absence of contrary evidence, presumed to be annexed to the enjoyment of another hereditament, corporeal or incorporeal.^(a) Incorporeal hereditaments appendant cannot be created (otherwise than by Act of Parliament) at the present day.^(b)

- (a) *Case of the Hundred of C.* (1497), Y.B. 12 Hen. VII, fo. 15, pl. 1.

Withers v. Iseham (1551), Dyer, 70 a.

Hill v. Grange (1555), 1 Plowd. 164.

Tyringham's Case (1584), 4 Co. Rep. 36 b.

Wyat Wild's Case (1609), 8 Co. Rep. 78 b.

- (b) *Anon.* (1534), Y.B. 26 Hen. VIII, fo. 4, pl. 15.

Baring v. Abingdon, [1892] 2 Ch. at p. 379, *per* STIRLING, J.

A *profit à prendre* arose at common law on a grant, prior to the Statute of *Quia Emptores*, 1290, by the lord of the manor to a freeholder of arable land; it carried a right to pasture, on the waste land of the manor, the animals required to plough and manure the land granted. The number of animals which could be depastured was limited in kind and in number. No *profit à prendre* appendant could be created after 1290 for a grant by the lord of a freehold, after that date, resulted in the grantee holding of the grantor's lord, and the land passed out of the manor altogether. Reasons have been given

(e.g. Scrutton, *Commons and Common Fields*, ch. II) for thinking that the technical difference between "appendancy" and "appurtenancy" does not date from the earliest stages of the common law. But it is clear that it can readily be traced back well into the fourteenth century (*Anon.* (1331), Y.B. 5 Ass. pl. 9; *Anon.* (1336), Y.B. 10 Edw. III, Hil. pl. 11); and Coke, though he is not very lucid on the subject (Co. Litt. 121 b, 122 a), is obviously familiar with the distinction. The practical differences between appendancy and appurtenancy are not numerous; the most important (other than that alluded to above) being that explained in § 1119. Coke seems to have thought (*loc. cit.*) that an incorporeal hereditament could not be appendant to another incorporeal hereditament. But that view is quite inconsistent with the earlier cases, and indeed with cases quoted by Coke himself in the passage referred to (e.g. *Totcombe Hundred Case* (1410), Y.B. 11 Hen. IV, Trin. pl. 44, and (1412), 13 Hen. IV, Mich. pl. 28). Two species of common are sometimes treated as resembling appendant rights, because they are not created by grant, express or implied. These are (1) "common pur cause de vicinage", and (2) "common of shack". The former is, as was said by COKE (Co. Litt. 122 a), and by WILLES, C.J., in *Musgrave v. Gave* (1742), Willes at p. 322, merely an excuse for a trespass, i.e. of cattle straying across the boundary of adjacent townships. (*Commissioners of Sewers v. Glasse* (1874), L.R. 19 Eq. at pp. 160-61.) The latter was a genuine right of pasture which was exercised over the unenclosed and inter-commonable arable fields of a township by the owners between harvest and sowing (*Corbet's Case* (1585), 7 Co. Rep. 5 a; *Cheesman v. Hardham* (1818), 1 B. & Ald. 706). There is an ancient doctrine, of which the meaning and precise application are doubtful, that a purely incorporeal hereditament appendant or appurtenant can only be claimed in respect of a principal subject with which it agrees "in nature and quality" (Co. Litt. 121 b; *Anon.* (1336), Y.B. 10 Edw. III, Hil. pl. 11; *Tyrringham's Case* (1584), 4 Co. Rep. 36 b).

*Partial
extinction*

1119. When a portion only of the land over or in respect of which a purely incorporeal hereditament appendant is exercisable becomes vested in the owner of such incorporeal hereditament, only so much of the incorporeal hereditament is extinguished as is proportionate to the amount of the servient tenement which has become vested in the owner of such incorporeal hereditament. This rule has no application to incorporeal hereditaments appurtenant.

Tyrringham's Case, *ubi supra*.

Wyat Wild's Case (1609), 8 Co. Rep. 78 b.

1120. A purely incorporeal hereditament is said *Appurtenant* to be "appurtenant" when, by virtue of a grant, express or implied, actual or presumed, it has been created, or is deemed to have been created, by the owner of the "servient tenement", (i.e. the land over or in respect of which it is claimed) to be enjoyed as ancillary to, and along with, the enjoyment of a principal hereditament corporeal or incorporeal ("dominant tenement").

Co. Litt. 121.

Nevil's Case (1570), 1 Plowd. 377.

Tyrringham's Case, *ubi supra*.

Sacheverell v. Porter (1637), Cro. Car. 482.

Atkyns v. Clare (1671), 1 Vent. at p. 407, *per* HALE, C.B.

Wheelton v. Burrows (1879), 12 Ch. D. 31.

Hanbury v. Jenkins, [1901] 2 Ch. 401.

Staffordshire and Worcestershire Canal Navigation v. Bradley, [1912] 1 Ch. 91.

Pwillbach Colliery Co., Ltd. v. Woodman, [1915] A.C. 634 at p. 636.

Cory v. Davies, [1923] 2 Ch. 95.

1121. When an easement, right, or privilege for *Legal annexation* a legal estate is created, it will enure for the benefit of the land to which it is intended to be annexed.

L.P.A., 1925, s. 187 (1).

1122. If a part of the dominant tenement to which *Apportionment* an incorporeal hereditament is appendant or appurtenant is conveyed away by the owner thereof "with the appurtenances", the incorporeal hereditaments, if divisible, will be apportioned; and a part thereof, proportionate to the part of the dominant tenement conveyed to him, will pass to the alienee, if the burden on the servient tenement is not increased by the division.

Co. Litt. 122 a.

Anon. (undated), Hob. 235.

Spooner v. Day and Mason (1636), Cro. Car. 432.

Sacheverell v. Porter, *ubi supra*, *per Curiam*.

Quære: Since the passing of the Conveyancing Act, 1881, s. 6, now replaced by the L.P.A., 1925, s. 62, has it been necessary for this

purpose to use the expression "with the appurtenances"? The appurtenances clause is now generally omitted in reliance on s. 62, *Jackson & Gosset. Title* 5th ed. p. 65.

*Benefit of
dominant
tenement*

1123. The owner of a tenement cannot claim, as appurtenant to that tenement, an incorporeal hereditament wholly unconnected with the enjoyment of that tenement.

Ackroyd v. Smith (1850), 10 C.B. 164 (easement).

Bailey v. Stephens (1862), 12 C.B. (N.S.) 91

Chesterfield (Lord) v. Harris, [1908] 2 Ch. 397 } (profits).

Staffordshire and Worcestershire Canal Navigation v. Bradley, [1912] 1 Ch. 91.

Harris v. Chesterfield (Earl), [1911] A.C. per Lord GORRELL at p. 637.

The land over which a right of way is claimed need not be contiguous to the dominant tenement (*Todrick v. Western National Omnibus Co., Ltd.*, [1934] Ch. 561).

*Passing
without
words*

1124. Subject to § 1207 *post*, purely incorporeal hereditaments appendant and appurtenant pass by a conveyance of the dominant tenement to which they are annexed, without express words,^(a) unless it appears from the conveyance that it was not the intention of the parties that they should do so.^(b)

(a) L.P.A., 1925, s. 62 (but only in conveyances subsequent to 1881). Co. Litt. 121 b.

Whistler v. Oxford (Bishop) (1613), 10 Co. Rep. 63 a.

(b) *Clark v. Barnes*, [1929] 2 Ch. 368.

It should be noted, that even express general words, unless clearly to that effect (*Doidge v. Carpenter* (1817), 6 M. & S. 47), will not pass rights not in existence at the date of the conveyance—i.e. will not create such rights *de novo* (*Baring v. Abingdon*, [1892] 2 Ch. 374 at p. 393, per BOWEN L.J.). And, by the provisions of the so-called statute *De Praerogativa Regis* (*Temp. Incert*), c. 17, a grant by the King of a manor, even "with the appurtenances", does not pass knights fees, dowers, or advowsons, without express mention (*Whistler v. Oxford (Bishop)*, *ubi supra*). It was also said by the Court in *Higgins v. Grant* (1583), Cro. Eliz. 18, that a demise for years of a manor by a private person would not pass an advowson appendant; unless the words "with the appurtenances" were used.

Severance

1125. A purely incorporeal hereditament appendant^(a) or appurtenant^(b) cannot (? without the consent

of the owner of the servient tenement) be severed in enjoyment from the dominant tenement.

- (a) *Musgrave v. Gave* (1742), Willes, at p. 322, *per* WILLES, C.J.
Smith d. Jerdon v. Milward (1782), 3 Doug. K.B. at p. 73, *per* Lord
 MANSFIELD, C.J.
- (b) *Drury v. Kent* (1603), Cro. Jac. 14.
Daniel v. Hanslip (1672), 2 Lev. 67.
Johnson v. Barnes (1872), L.R. 7 C.P. 592; affirmed (1873),
 L.R. 8 C.P. 527.
Ormerod v. Todmorden Joint Stock Mill Co., Ltd. (1883), 11 Q.B.D.
 at p. 172, *per* BOWEN, L.J.

In the two earlier of these cases, however, the Court seemed to think, that if the right was of a character so definite that it could not be increased, e.g. a right of common for a specific number of cattle, it might be severed from the dominant tenement; and this view was adopted by BOWEN, L.J., in the case last cited. And in *Musgrave v. Gave* (1742), Willes, 319, it was actually held that a right of common appurtenant might be demised by copy apart from the manor to which it was appurtenant; whilst in *Bunn v. Channen* (1813), 5 Taunt. 244, it appeared that similar rights were in fact demised for years. An advowson appendant can be severed from the dominant tenement (Co. Litt. 122 a). *Quære*, as to the legal title (L.P.A., 1925, s. 187 (1)).

1126. A purely incorporeal hereditament is said *In gross* to be "in gross", when the enjoyment of it is unconnected with the enjoyment of any dominant or principal tenement held by the person or persons in whom such incorporeal hereditament is vested.^(a) There cannot be an easement in gross.^(b)

- (a) Co. Litt. 120 b, 122 a.
Mellor v. Spateman (1669), 1 Saund. 343.
- (b) L.P.A., 1925, s. 187 (1) "easement, right, and privilege for a legal estate". The language of this subs. is peculiar; but the marginal note says: "Legal easements".
Welcome v. Upton (1840), 6 M. & W. 536.
Rangleley v. Midland Rly. Co. (1868), 3 Ch. App. 306 at p. 310, *per*
 CAIRNS, L.J.

The doctrine that "there cannot be an easement in gross", though it can be traced back as far as the fourteenth century (Y.B. (1347) 21 Ass. fo. 74, pl. 1), appears at one time to have fallen into oblivion (see, especially, Blackstone, *Comm.* III, 241; *Bailey v. Stephens* (1862), 12 C.B. (N.S.) at p. 111, *per* WILLES, J.; *Mounsey v. Ismay* (1865), 3 H. & C. at p. 498, *per* MARTIN, B.). It has, however, recently been revived with great vigour; and s. 187 of the

L.P.A., 1925, quoted above, adds force to it. In its modern form, it is sometimes stated that easements are not incorporeal hereditaments at all, but mere rights appurtenant to corporeal hereditaments (*Re Brotherton, Brotherton v. Brotherton, Re Markham's Settlement* (1907), 77 L.J. (Ch.) at p. 59, *per* JOYCE, J.). The result of the doctrine is that the Courts are driven to devise other titles to justify rights, of the *de facto* exercise of which there can be no doubt. Thus, rights of recreation (*Fitch v. Rawling* (1795), 2 Hy. Bl. 393, where the word "easement" is freely used), rights of mooring (*A.-G. v. Wright*, [1897] 2 Q.B. 318), and rights of spreading nets (*Mercer v. Denne*, [1905] 2 Ch. 538) have been justified by custom or public law—titles under which it is difficult to exclude from the exercise of the rights in question any person resident in the neighbourhood, or even any member of the public who may happen to be temporarily there. In very recent years, there has even been a disposition to extend the doctrine of the text to profits *à prendre*, at any rate in the absence of express grant (see the remarks of BUCKLEY, J., in *Ramsgate Corpn. v. Debling* (1906), 70 J.P. at p. 133). Another difficulty arises from the fact, that it has long been held for law that rights in the nature of profits *à prendre* cannot be claimed by custom (*Gateward's Case* (1607), 6 Co. Rep. 59 b; *Grimstead v. Marlowe* (1792), 4 Term Rep. 717; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. at p. 163, *per* PARKER, J.), otherwise than by copyholders. Here, too, the severity of the rule has led to evasion; for it has been held that profits *à prendre* (*White v. Coleman* (1673), 1 Freem. (K.B.) 134) and even franchises (*Cocksedge v. Fanshaw* (1779), 1 Doug. (K.B.) 119; affirmed in the Lords (*sub. nom. Fanshaw v. Cocksedge* (1783), 3 Bro. Parl. Cas. 690); *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633) may be claimed by prescription on behalf of an unincorporated class (e.g. "inhabitants" or "free burgesses"), either through a corporation or as a charitable trust. But in *Goodman v. Saltash Corpn.*, at p. 658, Lord BLACKBURN evidently thought that a profit *à prendre* in gross could be claimed by prescription.

Extinction

1127. If the owner of a purely incorporeal hereditament appurtenant or in gross purchases part of the land over or in respect of which such incorporeal hereditament is exercisable, such incorporeal hereditament is extinguished.

Wyat Wild's Case (1609), 8 Co. Rep. 78 b.

Dennett v. Pass (1834), 1 Bing. (N.C.) 388.

Apparently, the only cases in which this doctrine has been applied were those of commons and rent charges. *Quære*: as to franchises and easements.

1128. Any person in whom a purely incorporeal hereditament is vested, whether in present enjoyment or only in expectancy, may maintain an action for damages and an injunction against any other person who disturbs him in the exercise of his right, and thereby causes him appreciable damage in fact (*ante*, § 838). *Remedies for infringement*

Blackstone, *Comm.* III. pp. 236-42.

Leverett v. Townsend (1590), Cro. Eliz. 198 (common).

Yard v. Ford (1670), 2 Saund. 172 (market).

Jesser v. Gifford (1767), 4 Burr. 2141 (reversioner) } (*easements*).
Kidgill v. Moor (1850), 9 C.B. 364 (reversioner)

Other remedies, e.g. distress (*Leverett v. Townsend*, *ubi supra*; *Heddy v. Wheelhouse* (1597), Cro. Eliz. 558 (franchise); *Dixon v. James* (1698), 1 Freem. (K.B.) 273 (common), and abatement (*R. v. Rosewell* (1699), 2 Salk. 459 (*Lane v. Capsey*, [1891] 3 Ch. 411) are sometimes also employed against the disturber. In some cases no actual damage need be proved (see note to § 703 *ante*); but it is difficult to ascertain the true principle of the distinction. Even the Crown cannot grant a patent conferring a franchise which will work a disturbance of another franchise (*Butler's Case* (1680) 2 Vent. 344); and in some grants an express clause to that effect is inserted (2 Inst. 406). But the usual way of avoiding such a result is to hold an enquiry before granting a market or similar franchise. Such enquiry is not, however, conclusive (*Butler's Case*, *ubi supra*).

FRANCHISES

1129. A franchise or liberty is a royal privilege *Franchise* which is or has been in the hands of a subject. Franchises recognized by English law are rights of jurisdiction (including the right to goods of outlaws), rights of fair, market, ferry, and toll, rights to treasure trove, waifs, strays, wreck, free fishery, and royal fish.

22 & 23 Car. II (1670), c. 25, s. 2 ("royalties").

Finch, *Discourse of the Law*, bk. ii, cap. xiv.

A.-G. v. British Museum Trustees, [1903] 2 Ch. at p. 612, *per* FARWELL, J.

Of the magnitude of the franchise question in earlier times there can be no doubt; the Quo Warranto proceedings of 1278-9 show that the very existence of the State was once threatened by the extent and multiplicity of these anomalous privileges. Much has subsequently

been done, as will partly appear in the paragraphs dealing with the specific franchises, to curb the license of the feudal franchises ; but that such anomalies should survive at all, is one of the strongest proofs of the conservatism of English law.

Consideration must be shown

1130. Where the allowance of a franchise would impose a burden upon the public generally, or would be inconsistent with the existence of a public right, such franchise will not be supported by the Courts, unless a valuable consideration can be shown for it.

Haspurt v. Wills (1670), 1 Vent. 71 (harbour dues).

Prideaux v. Warne (1673), T. Raym. 232 (harbour dues).

Nottingham Corp'n. v. Lambert (1738), Wills, 111 (toll in a navigable river).

Truman v. Walgham and Key (1766), 2 Wils. 296 (toll on a highway).

These were all cases of prescriptive claims. But it was said by the Court in *Pelham (Lord) v. Pickersgill* (1787), 1 Term Rep. at p. 668, that even a grant by the Crown of a toll thorough on an ancient highway without consideration would be bad ; and this doctrine goes back at least to the sixteenth century (*Ward and Knight's Case* (1588), 1 Leon. at p. 232). In *Pelham (Lord) v. Pickersgill* it was held that a toll traverse could be claimed by prescription on proof that the toll and the soil of the highway were formerly in the same hands.

Merger in Crown

1131. Franchises which were originally part of the royal prerogative are extinguished by reunion with the Crown ; but franchises which could have no existence till created by an actual grant are not extinguished by such reunion.

Strata Marcella (Abbot of) Case (1591), 9 Co. Rep. at 25 b.

R. v. Briggs (1614), 2 Bulst. at p. 297, *per* COKE, C.J.

This doctrine has a very important consequence, viz. that on the regrant by the Crown of a manor to which a franchise of the former class has been appurtenant, the franchise does not pass to the grantee, if at all, without express words ; general words being insufficient for the purpose (*R. v. Capper, Re Bowles* (1817), 5 Price, 217 ; *A.-G. v. Downshire (Marquis)* (1816), *ibid.* 269). The same distinction is also important in proof of title ; for whereas franchises which were " flowers in the garland of the Crown " can be prescribed for in the ordinary way, franchises which could not exist without express grant *de novo* can only be proved by showing such grant by the Crown, or by proof of allowance by record within the time of legal memory (*Strata Marcella (Abbot of) Case, ubi supra*, at 27 b, 28 a ; *R. v.*

Briggs, ubi supra, at p. 297, where franchises of the latter class are described by COKE as franchises "in point of charter"). The doctrine has been recognized in recent times (*Northumberland (Duke) v. Houghton* (1870), L.R. 5 Exch. at pp. 131-2, *per* MARTIN and PIGOTT, BB.; *A.-G. v. British Museum Trustees*, [1903] 2 Ch. at p. 612-3, *per* FARWELL, J.).

1132. Any franchise may be forfeited by and to the Crown on proof of misuser^(a) or non-user^(b) by the claimant thereof; except that a franchise which exists only for the pleasure or profit of the owner is not forfeitable for mere non-user.^(c) *Forfeiture of franchise*

(a) *City of London v. Vanacre* (1699), 12 Mod. at p. 271, *per* HOLT, C.J. *Curwen v. Salkeld* (1803), 3 East at p. 545, *per* Lord ELLENBOROUGH, C.J.

(b) *Toitersall's Case* (1632), W. Jo. 283.
City of London v. Vanacre, ubi supra.

(c) *Leicester Forest Case* (1607), Cro. Jac. 155, *per* COKE, C.J. (The examples given by Coke are a park and a warren.)

The proper procedure for procuring the forfeiture of a franchise for misuser or non-user is a Sci. Fa. (*Re Islington Market Bill* (1835), 3 Cl. & Fin. at p. 519); for preventing the usurpation of a franchise, a Quo Warranto (*R. v. Stanton* (1610), Cro. Jac. 259; *City of London v. Vanacre, ubi supra*). But, where there is an allegation of non-user, either process will be correct; for, until decision, it cannot be known whether the defendant is usurping a new right or trying to revive an old one (*Darell v. Bridge* (1748), 1 Wm. Bl. 46). The proper judgment in a case of Quo Warranto is: that the defendant be ousted of his liberty; in a case of Sci. Fa., that the franchise be seized into the King's hands (*R. v. Stanton, ubi supra*, reported as *R. v. Staverton* (1610), Yelv. at p. 192). Forfeiture for non-user may be pronounced, even if an express grant of the franchise can be proved (*Darell v. Bridge, ubi supra*); but not where the charter, though in terms creating a right, in fact imposes a duty for the benefit of the public (*R. v. Havering Atte Bower (Steward and Suitors of)* (1822), 5 B. & Ald. 691). Misuser or non-user of a franchise does not entitle a private person to disturb it (*G.E. Rly. Co. v. Goldsmid* (1884), 9 App. Cas. 927).

1133. *Semble*: a franchise can be devised, assigned, or demised;^(a) but it cannot be divided.^(b) *Alienation of franchise*

(a) Wills Act, 1837, s. 3.

Constable's Case (1601), 5 Co. Rep. 106 a.

Bays v. Bird (1726), 2 P. Wms. at p. 399.

Neill v. Devonshire (Duke) (1882), 8 App. Cas. 135.

G.E. Rly. Co. v. Goldsmid (1884), 9 App. Cas. 927. (The facts are better given in *Goldsmid v. G.E. Rly. Co.* 25 Ch. D. 511.)

A.-G. v. Horner (1884), 14 Q.B.D. 245.

The older doctrine was, at least in some cases, that a franchise was not transferable (Brooke, *Abridgment*, Franchise, pl. 38 ; but the reference to 6 Edw. II cannot be traced) ; and it was said not to be devisable under the old Statute of Wills, 32 Hen. VIII (1540), c. 1. (See *dicta* in *Mountjoy's (Lord) Case* (1594), Godb. 17). There appears to be no doubt, however, that, in modern times, the rule has been the other way ; though in the well-known case of the hereditary shrievalty of Westmoreland, a preamble to an Act of Parliament (13 & 14 Vict. (1850), c. 30) expressed official doubts as to the devisability of that office. Doubtless, some franchises are inseparable from the tenements to which they are appurtenant. But, even on this point, it was said by Lord SELBORNE, C., in *Neill v. Devonshire (Duke)*, *ubi supra*, at p. 153, that the destruction of a manor to which a free fishery in a tidal river was appurtenant, by alienation of all the manor lands, would not extinguish the fishery, but leave it in gross in the hands of the alienor.

(b) *Mountjoy's (Lord) Case*, *ubi supra*, where it was said that there could not even be partition of a franchise.

Hundred

1134. The franchise of a hundred consists in the right to hold a hundred court or wapentake, with its incidents of the appointment of a bailiff of the hundred, return and execution of writs, and perception of fees, fines, and other profits of jurisdiction.^(a) A hundred cannot be severed from its county so as to become a franchise at the present day ; at any rate as respects the powers and duties of the sheriff.^(b)

(a) *Atkyns v. Clare* (1671), 1 Vent. at pp. 403 *et seq.*, per HALE, C.B. *Bays v. Bird* (1726), 2 P. Wms. at p. 399, per Lord KING, C.

(b) Sheriffs Act, 1887, s. 19 (1). This statute repeals the older legislation on the subject, viz. 2 Edw. III (1328), c. 12, and 14 Edw. III (1340), c. 9.

The hundred is a very ancient territorial district, coming between the county and the vill or township. From the earliest times it has also been a unit of judicial and police administration, and, as such, a source of revenue to the authority in whose hands it is vested. Though there can be little doubt that, originally, the hundred court was merely a popular assembly (" the suitors are judges " (*Fentleman's Case*, *Crosby v. Fentleman* (1583), 6 Co. Rep. at 12 a)), yet, after the Norman Conquest, the royal officials strove, on the whole successfully, to establish the modern doctrine, that all the hundreds in the kingdom belonged, in the absence of proof to the contrary, to the Crown (*Anon.*

temp. 1327-77), Keil. 151). Thus the claim by a subject to the profits of a hundred became a "franchise" in the strict sense; and the frequency with which it was asserted may be gathered, not only from the Hundred Rolls of 1275, but from such cases as *Atkyns v. Alare, ubi supra*, where the plaintiff claimed no less than seven of the thirty hundreds in the county of Gloucester. The formal recognition of this franchise consisted in the issue to the sheriff of the writ of *Non est mittas* (*ibid.* at p. 399); but the dangers of this recognition of feudal privilege were checked by the drastic provision of the Statute of Westminster the Second (13 Edw. I (1285), c. 39 (12)), by virtue of which, on any delay of the holder of the franchise to execute the royal process, a writ of *Non Omittas* might issue to the sheriff, bidding him do the work himself, notwithstanding the franchise. The jurisdictional claims of the owners of hundreds and all similar franchises were still further cut down by statute in 1535 (27 Hen. VIII, c. 24), as well as by the wholesale vesting in the Crown of the franchises belonging to dissolved religious houses. Still, it is clear that the *Non Omittas* was of practical, or at least technical, value, as late as the nineteenth century (*Carrett v. Smallpage* (1808), 9 East, 330; *Adams v. Osbaldeston* (1832), 3 B. & Ad. 489); though the gradual abolition by statute of private jurisdictions (e.g. by the Durham (County Palatine) Act of 1836, and the Liberties Acts of the same year and the year 1850) has tended to make the subject more and more of historical interest only. Nevertheless, express provision is made in a modern statute (Sheriffs Act, 1887, s. 34) for the conflicting powers of sheriff and lord of a hundred. The ancient civil jurisdiction of the hundred, though never formally abolished, has been, save in exceptional cases like that of Salford, practically destroyed by the effective rivalry of the modern statutory County Courts (County Courts Act, 1867, s. 28), but the possibility of its existence is still officially recognized (County Courts Act, 1934, s. 187). The administrative functions of all liberties and franchises are now vested in the county councils (Local Government Act, 1888, s. 48). The constitutional position of hundreds and other territorial franchises with regard to parliamentary elections does not fall within the scope of this work. Like the hundred, though more rarely, the greater jurisdiction of the county may have been at one time in private hands. But the last of the hereditary reversionalties was abolished in 1850 (13 & 14 Vict., c. 30); and it is long since a county palatine was vested in a subject as property.

1135. By the grant (? devise) of a "hundred", and belonging to the grantor (or testator) within the territory of the hundred does not pass; but only the franchise of the hundred. *Conveyance of "hundred"*

Bays v. Bird (1726), 2 P. Wms. 397.

Deputation

1136. The lord of a hundred is not entitled, as such, to issue a deputation appointing a gamekeeper under the provisions of the Game Act, 1831, s. 14.

Ailesbury (Earl) v. Pattison (1778), 1 Doug. (K.B.) 28 (decided on the corresponding section of the 22 & 23 Car. II (1670), c. 25 (s. 2)).

The right belongs to the lord of a manor (*post*, § 1139 (ii)).

Leet

1137. A leet is a franchise consisting of the right to hold a court of record for view of frankpledge and for the amercement of petty criminal offences, especially of breaches of the assize of bread and ale (but not of modern statutes creating similar offences), and to appoint ale-conners, burley-men, and other officials for executing the franchise. It is usually, but not necessarily, appendant to a hundred.^(a) The jurisdiction of the court leet is now exercised by the ordinary tribunals.^(b)

(a) Coke, 4 Inst. cap. 54.

Statute for View of Frankpledge (18 Edw. II (1325)).

12 Edw. IV (1472), c. 8.

Case of the Hundred of C. (1497), Y.B. 12 Hen. VII, fo. 15, pl.

Bedford (Duke) v. Alcock (1749), 1 Wils. 248.

Colebrooke v. Elliot (1766), 3 Burr. 1859.

(b) Mostly by the Justices of the Peace.

See also L.P.A., 1922, Sched. XII para. (6).

Even in Coke's day (see *op. cit.*) the origin and scope of this ancient Court were much in dispute; but the better opinion is, that it was in some way derived from the sheriff's tourn or semi-annual visitation of the hundred courts in his county, made (*inter alia*) for the purpose of seeing that the tithings were full (Magna Carta (1225), c. 35). If this view be correct, the doctrine which connects the leet with the hundred would seem to be well founded. The existence of the leet is recognized by statute so late as 1757 (31 Geo. II, c. 29, s. 43). The view of frankpledge was a police function consisting of the duty of seeing that the tithings or securities for good behaviour created or legalized by Edgar's Ordinance of the Hundred were duly enrolled. The assize of bread and ale was a schedule of prices and qualities of those articles annually fixed under the system laid down in 1266 (51 Hen. III, st. 1). Both institutions have long since disappeared; and the leet is of little, if any, practical importance at the present day. Consequently, it is unnecessary to do more than to refer to the decisions which have held, in comparatively modern times, (a)

that an amercement at a leet for a private injury done to the lord is illegal, in spite of custom (*Wood v. Loveatt* (1796), 6 Term Rep. 511), and (b) that a custom to compel residents within the franchise to be sworn at one court and to make their presentment at the next, is likewise bad (*Davidson v. Moscrop* (1801), 2 East, 56).

1138. A manor is a seignory or lordship, held *Manor* along with demesne lands, over estates of freehold tenure, to which is incident a right to hold a court or courts for the tenants of such estates, if any (*post*, § 1141).^(a) The soil of the waste of the manor (if any) is deemed, in the absence of proof to the contrary, to be vested in the lord of the manor, subject to the rights of the tenants of the manor^(b) and the members of the public.^(c)

(a) Co. Litt. 57 b, 58 a.

(b) *Doe d. Dunraven (Earl) v. Williams* (1836), 7 C. & P. at p.332, *per* COLERIDGE, J.

Gery v. Redman (1875), 1 Q.B.D. 161.

(c) L.P.A., 1925, s. 193: See also Access to Mountains Act, 1939.

Notwithstanding the abolition of copyhold tenure, it is clear that the "manor" is still a recognized legal institution (see L.P.A., 1925, ss. 62 (3), 201 (1), 205 (1) (ix).

1139. In addition to such purely honorary services *Manorial rights* of the tenant (e.g. Grand and Petty Serjeanty) as survive,^(a) the lord of a manor has, as such, the following rights, viz. :—

- (i) the right, as against the freehold tenants of the manor and strangers lawfully claiming rights of pasture thereon, to enclose or approve for his own benefit any portion of the waste lands of the manor; provided that he leaves sufficient pasture to satisfy such lawful claims.^(b) But such right of enclosure or approvement cannot be exercised without the consent of the Minister of Agriculture and Fisheries;^(c) and it is now subject to the provisions of the Law of Property Act, 1925, re-

garding access of the public to such waste lands for air and exercise.^(d) No erection of a windmill, sheepcote, dairy, or enlarging of a court necessary, or curtilage, will be deemed to prejudice a right of common of pasture ;^(e)

(a) L.P.A., 1922, s. 136.

(b) Statute of Merton (20 Hen. III (1235)), c. 4.
Statute of Westminster II (13 Edw. I (1285)), c. 40.

(c) Law of Commons Amendment Act, 1893, s. 2.

(d) L.P.A., 1925, ss. 193, 194. See also Access to Mountains Act, 1939.

(e) Statute of Westminster II, *ubi supra*.

By various statutes of the eighteenth and nineteenth centuries, of which the most important was the Inclosure Act, 1845, provision was made for obtaining Parliamentary sanction to the enclosure and allotment in severalty of manorial wastes ; but later legislation (e.g. the Law of Commons Amendment Act, 1893, s. 2, and the Commons Act, 1899, s. 22), whilst not formally repealing this provision, has rendered it virtually obsolete.

- (ii) the right to appoint and depute a game-keeper for the manor, or any division or district thereof, and to authorize him to kill game therein ;

Game Act, 1831, s. 14.

This right is not affected by the Game Licences Act, 1860, ss. 6-8.

- (iii) the right to erect a dovecot on his land within the manor.

Bowlston v. Hardy (1597), Cro. Eliz. at p. 548.

The owner of a "reputed" manor is presumed to have the same franchises as the lord of a legal manor (*Soane v. Ireland* (1808), 10 East, 259).

Conveyance
of "manor"

1140. A conveyance of a legal manor or reputed manor if made after 1881, will, in the absence of provision to the contrary, pass the demesne lands and the soil of the waste.

L.P.A., 1925, s. 62 (3). s. 205 (1) (ix). Previously to 1882, there was a doubt whether a conveyance of a "manor" passed more than the franchise rights.

On a conveyance of a reputed manor prior to 1881 nothing but the franchise passed without express words.

Doe d. Clayton v. Williams (1843), 11 M. & W. 803.

1141. If the lord of a manor conveys away any part of his demesne lands in fee simple, such lands cease to be parcel of the manor ;^(a) and, if they become re-united in such lord by re-purchase, they do not again become parcel of the manor.^(b) *Separation of demesnes*

(a) *Finch's Case* (1606), 6 Co. Rep. 63 a.

Chetwode v. Crew (1746), Willes, 614.

(b) *Delacherois v. Delacherois* (1864), 11 H.L.Cas. 62.

1142. A court baron is a franchise which entitles the lord of a manor in whom it is vested to hold a court for his tenants ; provided that there are at least two freehold tenants of the manor. Such franchise is presumed to be appendant to every manor. *Court baron*

Jenileman's Case, Crosby v. Jenileman (1583), 6 Co. Rep. 11 a.

Rumsey v. Walton (1760), cited in 4 Term Rep. at p. 446.

Bradshaw v. Lawson (1791), 4 Term Rep. 443.

As in the hundred court, so in the court baron, " the free suitors are judges " ; but the steward is an integral part of the court, and therefore a judicial officer (*Holroyd v. Breare* (1819), 2 B. & Ald. 473). The primary business of the court baron, until the abolition of copyholds, was to keep the records relating to the copyhold tenements of the manor, and to adjudicate upon disputes between tenants as to title. But the latter function was, despite Magna Carta (c. 34), practically abolished, so far as freehold tenants were concerned, before the end of the thirteenth century, by the fictions employed in the process of the Writ of Right, and by the Writs of Entry. On the other hand, the court baron appears, at least in some cases, to have acquired by special grant or prescription a good deal of miscellaneous civil jurisdiction, e.g. holding pleas of debt, and granting, and even trying, replevins (*Hellawell v. Eastwood* (1851), 6 Exch. 295). This jurisdiction has, however, also disappeared since the establishment of the modern County Courts ; and provision has been made for its formal extinction (County Courts Act, 1934, s. 187). Legal theory long distinguished two manorial courts, viz. the court baron for the freeholders, and the court customary for the copyholders. But the court customary was not treated as a franchise ; and it is, of course, now extinct (L.P.A., 1922, s. 138). The court baron is, however, recognized as capable of existing (L.P.A., 1925, s. 62 (3)).

*Goods of
outlaws*

1143. The right to the goods of outlaws is a franchise which entitles the person in whom it is vested to the corporeal chattels movable (but not to the leaseholds or things in action) of persons coming within the scope of the franchise who are outlawed on criminal process.

R. v. Sutton (1670), 1 Wms. Saund. 273.

R. v. Capper, Re Bowler (1817), 5 Price 217.

Before 1870, the franchise frequently included the forfeitures of felons; but the Forfeiture Act, 1870, s. 1, abolished forfeiture for conviction of treason and felony, and the Civil Procedure Acts Repeal Act, 1879, s. 3, abolished outlawry on civil process. Outlawry on criminal process is, however, still, in theory, possible.

*Fairs and
markets*

1144. A fair or market is a franchise entitling the person in whom it is vested, to the sole and exclusive right to hold, within the local limits of the franchise, at the place named in the grant, or, if no place is named, at any convenient place,^(a) a fair or market, or both (as the case may be), and to demand such tolls for the use thereof as may be permitted by the grant, from the persons resorting to such fair or market.^(b) A grant of a fair or market implies a grant of a right, now practically obsolete, to hold a court of pie-powders.^(c)

(a) *Dixon v. Robinson* (1686), 3 Mod. Rep. 107.

Curwen v. Salkeld (1803), 3 East, 538.

(b) Outrageous toll is a cause of forfeiture by the Statute of Westminster the First (3 Edw. I (1275), c. 31).

(c) 17 Edw. IV (1477), c. 2; made perpetual by 1 Ric. III (1483), c. 6.

4 Inst. 272, where the jurisdiction of the court is described.

Howel v. Johns (1600), Cro. Eliz. 773.

Goodson v. Duffield (1612), Moore K.B. 830.

There seems to be no legal distinction between a market and a fair; though, doubtless, in popular idea, the latter suggests something in the nature of a holiday, and it has been judicially held, though by an evenly divided Court, that a fair can exist without buying and selling (*Collins v. Cooper* (1893), 17 Cox, C.C. 647). See, however, the dictum of Coke (2 Inst. 406), and *Newcastle (Duke) v. Workson U.C.*, [1902] 2 Ch. at p. 155. A court of "pie-powders" (*pieds poudrés*)

was a court for the speedy settlement of disputes arising among the persons frequenting the market, who usually came from a distance.

1145. The lord of a market may, in the absence *Site of market* of special circumstances, move the site of the market place from one spot to another within the local limits of the franchise ;^(a) provided that the new site is equally convenient to the persons resorting to the market.^(b)

(a) *Curwen v Salkeld* (1803), 3 East, 538.

R. v. Cotterill (1817), 1 B. & Ald. 67.

(b) *R. v. Starkey* (1837), 7 Ad. & El. 95.

The precise site of the market place may be prescribed in the charter "by metes and bounds" ; and then, of course, no variation is possible. But such a restriction will not be presumed in a prescriptive market (*Gingell, Son and Foskett, Ltd. v. Stepney Borough Council*, [1908] 1 K.B. 115).

1146. The grant of a market does not of itself *No monopoly* entitle the grantee to prohibit the sale of tollable articles in private shops within the limits of the franchise during market hours ;^(a) but such a right may be acquired by prescription.^(b)

(a) *Macclesfield Corpn. v. Chapman* (1843), 12 M. & W. 18.

(b) *Mosley v. Walker* (1827), 7 B. & C. 40.

Macclesfield Corpn. v. Pedley (1833), 4 B. & Ad. 397.

Penryn Corpn. v. Best (1878), 3 Ex. D. 292.

A sale in a shop may be justified, if the owner of the market neglects to provide for sufficient accommodation.

1147. A grant of a market does not of itself *Tolls* entitle the grantee to levy tolls for the use of the market ;^(a) but such a right may be derived from indirect expressions in the grant or from prescriptive usage.^(b)

(a) *Heddy v. Wheelhouse* (1597), Cro. Eliz. 558.

Egremont (Earl) v. Saul (1837), 6 Ad. & El. 924.

Newcastle (Duke) v. Workop U.C., [1902] 2 Ch. 145.

(b) *Egremont (Earl) v. Saul*, *ubi supra*.

Lawrence v. Hitch (1868), L.R. 3 Q.B. 521.

The precise amount of the tolls need not be fixed by the charter. A grant of "reasonable" toll is good (*Lawrence v. Hitch*, *ubi supra*).

Tolls must be carefully distinguished from stallage and pickage. Tolls are in the nature of dues for the use of the market ; stallage and pickage are in the nature of rents for the occupation of specific plots of ground, and can, therefore, only be claimed by the owner of the soil (*R. v. Burdett* (1697), 1 *Ld. Raym.* 148). There was at one time a theory that all tenants in ancient demesne (i.e. tenants of manors in the hands of the King in the time of Edward the Confessor) had certain privileges of exemption from tolls in all or some markets (2 *Inst.* 229 ; *Case of the Town of Leicester* (1586), 2 *Leon.* 190). But it is doubtful if such a privilege could now be enforced.

*Disturbance
of market*

1148. Any act which amounts to a claim to conduct the process of selling, in rivalry with or to the prejudice of the market, within the local limits of a market franchise, or to take benefit of the market without paying the proper dues, whether done within the market place or not, is a disturbance of the market.

Tewkesbury Corporation v. Bricknell (1809), 2 *Taunt.* 120.

Bridgland v. Shapter (1839), 5 *M. & W.* 375.

Brecon Corpn. v. Edwards (1862), 1 *H. & C.* 51.

Goldsmid v. G.E. Railway Co. (1883), 25 *Ch. D.* at p. 548, *per* LINDLEY, L.J.

Wilcox v. Steel, [1904] 1 *Ch.* 212.

Needless to say, acts aiming more directly at destruction of the franchise, such as claiming to have a rival franchise, or creating an affray or riot with the object of preventing resort to the market, would equally amount to a disturbance. Many of the more important markets are at the present day in the hands of municipal bodies and are governed by the provisions of the Markets and Fairs Clauses Act, 1847, and its amendments, which (*inter alia*) impose summary penalties for certain disturbances of their privileges. *Quære*: Where the market in question is an entirely new market, created under the Act, are these new penalties in addition to, or substitution for, the common law action? (*Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 *Ch.* 894).

Exclusion

1149. A person who, being willing to pay the ordinary tolls and to observe the rules of the market, has been unreasonably excluded from the market, may carry on his business elsewhere within the limits of the franchise.

London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd., [1936] *Ch.* 78.

1150. A ferry is the exclusive right of transport- *Ferry*
ing, for hire or reward, passengers or goods, or both
(as the case may be), within a certain area, across a
river or arm of the sea, by means of a boat or other
movable structure.^(a) Such ferry may be either from
vill to vill, or from highway to highway.^(b)

- (a) *Tripp v. Frank* (1792), 4 Term Rep. 666 (arm. of the sea).
Huzzey v. Field (1835), 2 Cr.M. & R. at p. 442, *per* Lord ABINGER,
C.B. (arm of the sea).
Newton v. Cubitt (1862), 12 C.B.N.S. at p. 58, *per* WILLES, J. (river).
(b) *Cowes U.C. v. Southampton, Isle of Wight and South of England*
Royal Mail Steam Packet Co., [1905] 2 K.B. 287 (arm of the sea).

1151. No act is a disturbance of a ferry, unless *Disturbance*
in substance it merely provides an alternative route *of ferry*
between the *termini* of the ferry.^(a) The building
of a bridge is not a disturbance of a ferry; even
though it clearly diverts traffic from the ferry.^(b)

- (a) *Tripp v. Frank*, *ubi supra*.
Huzzey v. Field, *ubi supra*.
Newton v. Cubitt, *ubi supra* (confd. on appeal, 13 C.B.N.S. 864).
Hopkins v. G.N. Rly. Co. (1877), 2 Q.B.D. 224.
Cowes U.C. v. Southampton, etc., *ubi supra*.

These cases go to show that the owner of a ferry cannot claim to
compel the public to use his ferry when a more convenient route is
open to them.

- (b) *Hopkins v. G.N. Rly. Co.*, *ubi supra*.
Dibden v. Skirrow, [1908] 1 Ch. 41.

Overruling *dictum* of BLACKBURN, J., in *R. v. Cambrian Rly. Co.*
(1871), L.R. 6 Q.B. at p. 430. In both the cases above quoted, the
building of the bridge provided for traffic which could not have made
use of the ferry. *Quaere*: Was this an essential point in the defence?

1152. The owner of a ferry is not allowed to *Bridge*
substitute a bridge for a ferry. But such an act is a *instead of*
public nuisance; and a person bringing an action *ferry*
in respect of it must prove special damage (*ante*;
§ 820 (ii)).

Paine v. Partrich (1690), Carth. 191.

1153. A toll thorough is a right to demand a *Tolls*

sum certain in respect of each passenger or chattel passing along a public highway (including a bridge and a navigable river) between certain points.^(a) A "toll traverse" is a right to demand a sum certain in respect of each passenger or chattel passing across the plaintiff's land.^(b) Subject to § 1131, n., a right of toll may be acquired by royal grant or prescription.

- (a) *Smith v. Shepherd* (1599), Cro. Eliz. 710, overruling the *dictum* of THORP, J., in Y.B. (1348), 22 Ass. pl. 58, and also ruling that, notwithstanding c. 15 of the Statute of Marlbridge (1267), a distress for the toll might be levied in the highway itself.

Steinson v. Heath (1693), 3 Lev. 400.

Vinkinstone v. Edden (1698), Carth. 357.

- (b) *Anon.* (temp. 1327-77), Keil. 151.

Anon. (1489), Y.B. 5 Hen. VII, Mich. pl. 22, *per* FAIRFAX, J.

James v. Johnson (1677), 1 Mod. Rep. 231.

Pelham (Lord) v. Pickersgill (1787), 1 Term Rep. 660.

A few other rights of a similar character are recognized by English law, e.g. for compulsory user of a mill, for which an appropriate writ (*Secta ad Molendinum*) existed in the Register (*Hix v. Gardiner* (1614), 2 Bulst. 195), and for compulsory user of a common bakehouse (*Farmour v. Brook* (1590), reported under last case). A "turn toll" was mentioned, but not defined, in *Webb's Case* (1608), 8 Co. Rep. at 46 b. It is said to be a toll taken in respect of each beast that goes to market and returns unsold across the claimant's land. If this view is correct, it would be merely a species of toll traverse.

Treasure trove

1154. The franchise of treasure trove is the right to any articles of gold or silver (including money), which have been concealed in land within the limits of the franchise, when the owner of such articles cannot be discovered.

3 Inst. 132.

A.-G. v. British Museum Trustees, [1903] 2 Ch. 598.

Waif

1155. The franchise of waif is the right to stolen goods abandoned by the thief escaping on a charge of felony within the limits of the franchise.^(a) If the owner of the goods assists promptly in bringing the accused to justice, he can recover his goods from

the lord of the franchise, and damages for any injury thereto by such lord.^(b)

(a) *Davies' Case* (1598), Cro. Eliz. 611.

Foxley's Case (1601), 5 Co. Rep. 109 a.

(b) *Rooke and Denny's Case* (1586), 2 Leon. 192.

Waif does not give a claim to the goods of the felon himself, though there may be a separate claim to such goods, or at any rate there might have been, before the passing of the Forfeiture Act, 1870 (*Foxley's Case*, *ubi supra*). It seems to have been assumed (Y.B. (1473), 13 Edw. IV, Pasch. pl. 5; *R. v. Hanger* (1614), 3 Bulst. at p. 10, *per* HAUGHTON, J.) that the *Carta Mercatoria* of 1303 (printed in Hall, *History of the Customs Revenue*, part i, p. 202) exempted the goods of alien merchants from being claimed as waifs).

1156. The franchise of stray is the right to *Stray* seize any tame beast found wandering unlawfully without apparent owner within the local limits of the franchise.^(a) The owner of such beast has a right to reclaim it upon tender of reasonable expenses at any time within a year and a day of the proclamation of seizure;^(b) but, failing such claim, it then becomes the property of the lord of the franchise.^(c)

(a) Bl. *Comm.* I, 297.

Dogs and cats, which were not at common law considered valuable, or wild animals cannot be claimed as strays (Bl. *Comm.*, *ubi supra*, at p. 298); and no fowl can be a stray except a swan, Co. Litt. 114 b. (*Case of Swans* (1592), 7 Co. Rep. 15 b).

(b) *Taylor and James' Case* (1607), Godb. 150.

(c) *Constable's Case* (1601), 5 Co. Rep. at p. 108 b.

Anon. (undated), 12 Co. Rep. 101.

Before this time the lord of the franchise acquires no property; and so, if the beast escapes and falls into the hands of the lord of another franchise, the lord of the first franchise has no remedy (*Harvie v. Blacklode* (1610), 1 Brownl. 236). But if his possession is interfered with, he can sue in Trespass (*Dalton v. Barnard* (1618), Cro. Jac. 513).

1157. The lord of a franchise who has seized a *Rights of franchise* beast as stray may not, until he becomes the owner, work or injure it;^(a) but (*semble*) he may milk a stray cow without being accountable for the value of the milk.^(b)

inland lake, however large, not being an arm of the sea, nor in running water forming a non-tidal river; nor could the Crown, by virtue of the prerogative, at any time have granted a free fishery therein.

Bristow v. Cormican (1878), 3 App. Cas. 641 (overruling the doubt expressed in *Marshall v. Ulleswater Co.*, *ubi supra*, at p. 742).
Johnston v. O'Neill, [1911] A.C. 552.

*Change of
tidal river*

1161. If a tidal river totally changes its course, whether by slow degrees or suddenly, no right of free fishery which may have existed in respect of the deserted bed is transferred to the new channel.

Carlisle Corpn. v. Graham (1869), L.R. 4 Exch. 361.

Royal fish

1162. The franchise of royal fish is the right to such sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish have in themselves great and immense size or fat, as may be cast up or driven ashore within the limits of the franchise.

Constable's Case (1601), 5 Co. Rep. 106 a.
Cinque Ports (Lord Warden) v. R. (1831), 2 Hag. Adm. 438.

Free warren

1163. A free warren is the right to harbour and take hares, rabbits, pheasants, partridges, and other similar beasts and birds, in their wild state, for purposes of sport, within the limits of the franchise, and to appoint a warrener to protect such game.^(a) Such franchise may be claimed over the land of the claimant, or, by prescription, over the land of another person.^(b) Free warren is not an essential feature of a manor.^(c)

(a) Co. Litt. 233 a.

Wadhurst v. Damme (1604), Cro. Jac. 45.

Rice v. Wiseman (1615), 3 Bulst. 82, *per* DODDERIDGE, J.

Beauchamp (Earl) v. Winn (1873), L.R. 6 H.L.C. at p. 239, *per* Lord CHELMSFORD, C.

(b) *Anon.* (1537), 1 Dyer, 30 b.

A.-G. v. Parsons (1832), 2 Cr. & J. at p. 302, *per* Lord LYNCHURST, C.B.

(c) *Bowlston v. Hardy* (1597), Cro. Eliz. 547.

Morris v. Dimes (1834), 1 Ad. & El. 654.

And, therefore, a right of free warren will not pass by a conveyance of a manor, even "with the appurtenances"; unless it is strictly appurtenant to the manor (*Bowlston v. Hardy*, *ubi supra*). (But see now L.P.A., 1925, s. 62 (3), which is retrospective to 1881.)

1164. By the grant (or devise) of a "free warren" (with or without description of the game therein), the ownership of the soil does not, in the absence of expression to the contrary, pass to the grantee (or devisee). *Conveyance of free warren*

Beauchamp (Earl) v. Winn, *ubi supra* (overruling on this point the *dicta* in *Rice v. Wiseman*, *ubi supra*).

1165. *Semble*: the lord of a franchise of warren has a qualified property in the beasts and fowls within the warren; and can bring the action of Trover against any one who starts any of such beasts or fowls in the warren, and converts them to his own use within or without the warren. *Property in animals*

Bl. *Comm.* II, 419.

Sutton v. Moody (1697), 1 *Ld. Raym.* 250, *per Holt*, C.J. (referred to with approval in *Blades v. Higgs* (1865), 11 *H.L.Cas.* at p. 633).

Note

In addition to the franchises dealt with above, there are a few instances, e.g. forest, chase, and park, which have a theoretical existence; but, apart from the rights of the Crown (which do not form part of the subject matter of this work), are of little, if any, practical importance. It has not, therefore, been deemed necessary to set them out in detail. For particulars, the enquirer may be referred to Manwood's classical *Treatise of the Lawes of the Forest*, first published in 1598, and to Mr G. J. Turner's admirable *Select Pleas of the Forest* (Selden Society's Publications, Vol. XIII).

1166. The Crown at the time of granting a franchise, and the lord of a franchise at any time, may exempt from the operation of the franchise any person or class of persons. Such an immunity may be proved by express grant or long usage. *Immunities*

R. v. Hanger (1614), 3 *Bulst.* 1.

Cocksedge v. Fanshaw (1779), 1 *Doug. (K.B.)* 119; *affirmed sub nom.*

Fanshaw v. Cocksedge (1783), 3 *Bro. Parl. Cas.* 703.

Lockwood v. Wood (1841), 6 Q.B. 31.

Goodman v. Saltash Corpn. (1882), 7 App. Cas. at p. 642, *per* Lord SELBORNE, C.

The alleged immunity of the tenants in ancient demesne from market tolls throughout England would, if enforced, be a conspicuous example of an immunity.

EASEMENTS

Easement

1167. An easement is a right, of a definite and limited character,^(a) annexed to the enjoyment of a corporeal or incorporeal hereditament ("dominant tenement"),^(b) by reason whereof the occupier of another corporeal hereditament ("servient tenement") is bound to permit the person in whom the right is for the time being vested, to do something on, in, or over the servient tenement, other than taking corporeal substance,^(c) or whereby the owner or occupier of the servient tenement is bound to abstain from exercising one or more of the ordinary rights of ownership or occupation, or, in rare cases, to do something, for the benefit of the occupier of the dominant tenement.^(d) Easements recognized by English law are rights of way and water, rights of light and air, rights of support, rights of affixing chattels to land or buildings, rights of projection over an adjoining tenement, and rights to the maintenance of fences, but the list of easements is not closed.

(a) *Hewlins v. Shippam* (1826), 5 B. & C. at p. 229, *per* BAYLY, J., quoting with approval *Termes de la Ley*.

(b) *Rangeley v. Midland Rly. Co.* (1868), 3 Ch. App. at p. 310 (and see *ante*, § 1031).

Hanbury v. Jenkins, [1901] 2 Ch. 401. (Could an easement be appurtenant to another easement? See *A.-G. v. Copeland*, [1901] 2 K.B. at p. 106). See *Gale on Easements*, 11th Ed., pp. 17-18, an easement may be appurtenant to an incorporeal hereditament, provided it is not incongruous, (*Hanbury v. Jenkins*, *supra*, *per* BUCKLEY, J., at pp. 422-3), where he considered an incorporeal right of way might be appurtenant to an incorporeal right of fishing. The contrary is expressed by Lord ALVERSTONE in *A.-G. v. Copeland*, *supra*, at p. 101, and *Co. Litt.* 121 b. Butler's edition agrees with this. It seems more in accordance with

principle that a profit *à prendre* includes the whole right, the right to fish and the right of way form one incorporeal hereditament.

- (c) For this purpose, water in a natural stream or pond or spring is not deemed to be a corporeal substance (*Race v. Ward* (1855), 4 E. & B. 702).

- (d) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. at p. 322, *per* TWYSDEN, J. *Star v. Rookesby* (1710), 1 Salk. 335, Ex. Ch.

It has been stated that an easement is not strictly an incorporeal hereditament, for it does not descend apart from the ownership of the dominant land to which it is annexed. It does not involve such an interest in land that its owner may maintain an action of trespass to the servient land, nor can estates be created in it apart from the dominant tenement. (*Halsbury, Laws of England*, 2nd Ed., Vol. XI, p. 269).

True easements, and, to a certain extent, even profits *à prendre*, must be carefully distinguished, not only from customary rights (*post*, Title VII), but also from simple licences and so-called "natural rights of property". Licences are, properly speaking, mere permissions given by the occupier of land, without passing any interest in the property to which they relate, and merely prevent the acts for which permission is given from being wrongful. They are in general merely personal arrangements between the parties, the benefit cannot be assigned, nor will the burden pass with the land. A bare licence, that is, one granted otherwise than for valuable consideration, is revocable by the licensor without rendering him liable in damages, even if granted by deed (*Wood v. Leadbitter* (1845), 13 M. & W. 838). A licence coupled with an interest in land or chattels thereon, is irrevocable and assignable. The real difficulty is whether interest covers a contractual interest (*Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1) so as to make a licence for consideration irrevocable. On this difficult topic see *Winfield, Text-book of the Law of Tort*, 3rd Ed., pp. 317-21. The cases are difficult to reconcile, but it is clear that no period of notice need be given to revoke a revocable licence, but the licensee must be given a reasonable time in which to leave the premises (*Minister of Health v. Bellotti*, [1944] K.B. 298). A licence for consideration may be irrevocable (*Millenium Productions, Ltd. v. Winter Garden Theatre (London), Ltd.*, [1946] 1 All E.R. 678). So-called natural rights of property, e.g. the right of a riparian proprietor to use water naturally flowing past or over his land, the right to dig in one's own soil, etc., are merely examples of the larger rights of ownership or occupation; and, though they bear some superficial resemblance to true easements, they are readily distinguishable from them. Thus, in the case of so-called "natural rights" (1) the existence of the right is presumed, and the *onus* lies on the person who denies it (*Portsmouth Borough Waterworks Co. v. London, Brighton & South Coast Rly. Co.* (1909), 26 T.L.R. at p. 175, *per* PARKER, J.), and (2) it is not extinguished by unity of possession or abandonment

(*Sury v. Pigott* (1626), Poph. 166 ; *Wood v. Waud* (1849), 3 Exch. 748), though, of course, a recognized easement may be acquired by prescription which renders exercise of the natural right impossible. It is also important to remember, that an easement exists for the benefit of the dominant tenement ; and that, therefore, the exercise of it cannot, by any length of user, give rise to a counter-easement for the benefit of the owner of adjoining land who has, in fact, profited by it (*Arkwright v. Gell* (1839), 5 M. & W. 203 ; *Wood v. Waud*, *ubi supra* ; *Mason v. Shrewsbury and Hereford Railway Co.* (1871), L.R. 6 Q.B. 578).

Way

1168. A right of way is a right of passing on, through, or over^(a) a servient tenement, from a given point to a given point,^(b) for a definite purpose or for all purposes.^(c) Such a right of passage may be exercisable by means of vehicles ("cart", "carriage", or "wagon way"), horses or other animals ("bridle", "horse", "pack", or "drift way"), or on foot only ("foot way").^(d)

- (a) An underground right of way is familiar in practice, in connection with mining leases, and may be lateral or vertical. It is usually called a "way-leave" (*Dand v. Kingscote* (1840), 9 L.J. (Ex.) 279). A claim to right of aerial private way has not yet, it is believed, come before the Courts. But there seems no reason to doubt that such a right would be possible.
- (b) This, at any rate, was the old doctrine (*Alban v. Brounsall* (1609), Yelv. 163 ; *Rouse v. Bardin* (1790), 1 Hy. Bl. 351, *per* Wilson, J.). But it seems to have been held in recent years that if the *termini* are ascertained, it is immaterial that the track is undefined ; though the right to define it, in the absence of prescription, probably belongs to the grantor (*Deacon v. S.E. Rly. Co.* (1889), 61 L.T. 377). This modern doctrine has, however, been questioned in a recent case by VAUGHAN WILLIAMS, L.J. (see *Metropolitan Rly. Co. v. Great Western Rly. Co.* (1901), 84 L.T. at p. 340). A terminus of a right of way need not be a public highway (*Williams-Ellis v. Cobb*, [1935] 1 K.B. 310 (though it usually is so)).
- (c) *United Land Co. v. Great Eastern Rly. Co.* (1875), 10 Ch. App. at p. 590, *per* MELLISH, L.J.
Skeshley v. Berger (1893), 69 L.T. 754.
- (d) Co. Litt. 56 a.

To the rights of way enumerated in the text may perhaps be added that of a "smoke way", i.e. the right to pass smoke through one's neighbour's chimneys (*Jones v. Pritchard*, [1908] 1 Ch. 630). It is a disturbance of an ordinary right of way to lock a gate through which the owner of the right of way must pass to exercise it ; even

though the person locking it offers to supply a key to the owner of the right of way (*Guest's Estates, Ltd. v. Milner's Safes, Ltd.* (1911), 28 T.L.R. 59). But the erection of a gate across a right of way is not necessarily a legal disturbance (*Petty v. Parsons*, [1914] 2 Ch. 653). To be actionable there must be a substantial obstruction.

1169. A cart or waggon or carriage way entitles *Cart way* the person in whom it is vested to the passage of all vehicles drawn by horses or other animals or propelled by automatic force;^(a) but not to the passage of unharnessed animals,^(b) nor of foot passengers.^(c)

(a) Even here, however, the exercise of the right may be restricted, expressly or by implication, to specific purposes; it depends on the circumstances of each case. (*Cowling v. Higginson* (1838), 4 M. & W. 245).

(b) *Ballard v. Dyson* (1808), 1 Taunt. 279.

(c) *Higham v. Rabett* (1839), 5 Bing. (N.C.) 622.

It seems now clear that a right of carriage way (unqualified) includes the right of passage of automatic vehicles (*A.-G. v. Hodgson*, [1922] 2 Ch. 429). (*Lock v. Abercester, Ltd.*, [1939] Ch. 861.) But it does not authorize the laying of rails (*Re Bidder and North Staffordshire Rly. Co.* (1878), 4 Q.B.D. 412).

1170. Neither a bridleway, nor a driftway, nor *Bridle-, drift-, and footway* a footway, entitles the person in whom it is vested to use hand-carts for conveying articles along the way.

Brunton v. Hall (1841), 1 Q.B. 792.

For the meanings of these ways, see *ante*, § 1168.

1171. In the case of a claim of way under an *Extent of right* express grant, it is a question of construction for the Court,^(a) guided, in the absence of any clear indication of the intention of the parties, by the maxim that a grant must be construed most strongly against the grantor, and in a claim by prescription or other implied grant, a question of fact for the jury, in each case,^(b) whether the right of user of the way is limited by the needs of the occupants of the dominant tenement at the date of the inception or presumed inception of the right, or whether such right is suffi-

ciently extensive to cover subsequent requirements. But a complete change in the character or size of the dominant tenement destroys, or at least suspends, the exercise of the right of way.^(c)

- (a) *Dand v. Kingscote* (1840), 9 L.J. (Ex.) 279.
Allan v. Gomme (1840), 11 Ad. & El. 759.
Henning v. Burnet (1852), 8 Exch. 187.
Williams v. James (1867), L.R. 2 C.P. at p. 581, *per* WILLES, J.
G.W. Rly. Co. v. Talbot, [1902] 2 Ch. 759.
Grand Hotel, Eastbourne, Ltd. v. White (1913), 84 L.J. (Ch.) 938 (H.L.).

The test is what may fairly be taken to have been contemplated at the time of the grant (*G.W. Rly. Co. v. Talbot*, *ubi supra*, at p. 767).

- (b) *Williams v. James* (1867), L.R. 2 C.P. 577.
- (c) *Allan v. Gomme*, *ubi supra*.
Wimbledon and Putney Commons Conservators v. Dixon (1875), 1 Ch. D. 362.
London Corp'n. v. Riggs (1880), 13 Ch. D. 798 ("way of necessity").
Harris v. Flower (1904), 74 L.J. (Ch.) 127.
Milner's Safe Co. Ltd. v. Great Northern and City Rly. Co., [1907] 1 Ch. 208.

Unless, of course, the grant were general in its character, when the way could be used for all purposes (*South Metropolitan Cemetery Co. v. Eden* (1855), 16 C.B. 42).

Repair of way

1172. The person claiming the right of way is entitled, but (*semble*) not compellable, to repair the way. The occupier of the servient tenement is not (in the absence of agreement) compellable to repair the way; and the person claiming the right of way cannot justify trespassing on adjacent land belonging to such occupier, on the ground that the way was out of repair.

- Pomfret v. Ricroft* (1669), 1 Wms. Saund. at p. 322, *per* TWYSDEN, J.
- Taylor v. Whitehead* (1781), 2 Doug. (K.B.) 745.
- Jones v. Pritchard*, [1908] 1 Ch. at p. 638, *per* PARKER, J.

But the owner of the servient tenement may be bound by express covenant or prescription to repair; and then, if he does not, a trespass may be justified (*Henn's Case* (1633), W. Jo. 297), as it is in cases of actual obstruction by the subservient owner (*Selby v. Nettlefold* (1873), 9 Ch. App. 111).

Water

1173. Easements of water recognized by English

law are (i) the right to draw water from a natural or artificial stream, spring or pond,^(a) (ii) the right to the uninterrupted flow of water in an artificial stream past or over the claimant's land,^(b) (iii) the right to discharge water on to a servient tenement,^(c) (iv) the right to divert or foul a natural stream or artificial watercourse,^(d) (v) the right to have water flow in a defined channel or pipe on or through a servient tenement.^(e)

- (a) *Mason v. Hill* (1833), 5 B. & Ad. 1.
Manning v. Wasdale (1836), 5 Ad. & Fl. 758.
Race v. Ward (1855), 4 E. & B. 702.
Watts v. Kelson (1871), 6 Ch. App. 166.
Burrows v. Lang, [1901] 2 Ch. 502.
- (b) *Bealey v. Shaw* (1805), 6 East, 208.
Saunders v. Newman (1818), 1 B. & Ald. 258.
Mason v. Hill, *ubi supra* (second claim).
Northam v. Hurley (1853), 1 E. & B. 665.

The right, subject to the similar rights of higher riparian proprietors, to have sufficient flow of a natural stream for ordinary domestic or agricultural purposes is, of course, not an easement, but a natural right of property of every riparian owner against whom a counter-easement has not been acquired (*Mason v. Shrewsbury and Hereford Rly. Co.* (1871), L.R. 6 Q.B. at p. 582, *per* BLACKBURN, J.; *McCartney v. Londonderry and Lough Swilly Rly. Co.*, [1904] A.C. at p. 306, *per* Lord MACNAGHTEN).

- (c) *Thomas v. Thomas* (1835), 2 Cr.M. & R. 34.
Harvey v. Walters (1873), L.R. 8 C.P. 162.
Brown v. Dunstable Corpn., [1899] 2 Ch. 378.
- (d) *Wright v. Williams* (1836), 1 M. & W. 77.
Beeston v. Weate (1856), 5 E. & B. 986.
Carlyon v. Lovering (1857), 1 H. & N. 784.

It is probably as a right to divert that the anomalous right decided in *Simpson v. Godmanchester Corpn.*, [1897] A.C. 696, to be an easement, can best be justified (see *per* Lord DAVEY, at p. 707).

- (e) *Watts v. Kelson* (1871), 6 Ch. App. 166. This case shows, incidentally, that the owner of such a right is entitled to enter upon the servient tenement to repair the pipe.

1174. A right of light is a right to the uninterrupted access to the claimant's windows or other apertures in a building, such as skylights, of a certain quantity, or reasonable quantity, of light across a *Light and air*

servient tenement.^(a) A right of air is a right to the uninterrupted access of air through a defined artificial channel from the servient to the dominant tenement.^(b)

- (a) The well-known decision in *Colls v. Home and Colonial Stores, Ltd.*, [1904] A.C. 179, has laid it down that, when the claim to light is founded on prescription (*semble*, under the Prescription Act, 1832), nothing can be alleged as an interference which does not amount to a nuisance, i.e. nothing which leaves reasonably sufficient light for ordinary purposes; the standard being the same for industrial and residential areas (*Horton's Estate, Ltd. v. Beattie, Ltd.*, [1927] 1 Ch. 75, *per* RUSSELL, J. *Sed quare*: "A reasonable man would not expect precisely as much light in Mayfair as he would get in the country". (*Fishenden v. Higgin and Hill, Ltd.* (1935), 153 L.T. at p. 140, *per* ROMER, L.J.). And it has since been expressly held, that even proof of special user for twenty years will not enable the claimant to get more (*Ambler v. Gordon*, [1905] 1 K.B. 407). But it is believed that no decision has ruled, that an exceptional quantity of light cannot be secured by express, or, even, presumably, by implied grant or prescription at common law. (See, however, the remarks of MELLISH, L.J., in *Kell v. Pearson* (1871), 6 Ch. App. at p. 813, highly approved of in *Colls v. Home and Colonial Stores, Ltd.*, and of PARKER, J., in *Browne v. Flower*, [1911] 1 Ch. at p. 226, implication from principle of no derogation from grant.) As to what is a reasonable amount of light, see the remarks of the learned lords in the *Colls* case on the "forty-five degrees rule". There can be no right to light in respect of land uncovered by buildings, at any rate by prescription (*Roberts v. Macord* (1832), 1 Mood. & R. 230).

- (b) The claim of air was at one time usually brought in connection with the claim of light; but no mention of air was made in the injunction (*Bryant v. Lefever* (1879), 4 C.P.D. 172). It was, however, hinted in that case, as well as in *Harris v. De Pinna* (1886), 33 Ch. D. at p. 250, and actually decided in *Cable v. Bryant*, [1908] 1 Ch. 259, that a right to the access of air through a particular aperture may be acquired as an easement, presumably to a building.

rebuilding

1175. The fact that the owner of a dominant tenement pulls down or alters the building with a view to reconstruction,^(a) or changes the purposes, to which it is put, does not destroy his right to light.^(b) But conduct from which it can be inferred that he has abandoned his right does.^(c)

- (a) *Staigh v. Burn* (1869), 5 Ch. App. 163.
Ecclesiastical Commrs. for England v. Kino (1880), 14 Ch. D. 213.
Andrews v. Waite, [1907] 2 Ch. 500.

(b) *Ecclesiastical Commrs. for England v. Kino, ubi supra.*

(c) *Swan v. Sinclair*, [1925] A.C. 227. Non user for fifty years and acquiescence in obstruction.

Of course, the alteration in the building or user cannot in law increase or alter the burden on the servient tenement (*Ankerson v. Connolly*, [1907] 1 Ch. 678). But, in fact, it may be very difficult for the servient owner to obstruct enlarged or new windows without obstructing the old light. Where an obstruction is an infringement of an easement of light for one set of windows, and another set of windows (for which no easement exists) is also obstructed by it, damages may be recovered in respect of both sets of windows. (*Re London, Tilbury and Southend Rly. Co., and Gower's Walk Schools Trustees* (1889), 24 Q.B.D. And a plaintiff whose lights have been obstructed is entitled, in the assessment of damages, to have it taken into account that he is owner of adjoining land which would enable him to erect a larger or better building (*Griffith v. Clay (Richard) & Sons, Ltd.*, [1912] 1 Ch. 291). (*Wills v. May*, [1923] 1 Ch. 317.)

1176. The fact that, owing to the acts of other persons, the dominant tenement will, notwithstanding obstruction by the servient owner, receive as much light as before the obstruction, is no answer to a claim for obstruction; at any rate if the new light is not legally secured to the dominant tenement. *Alternative lights*

Dyers' Co. v. King (1870), L.R. 9 Eq. 438.

Colls v. Home and Colonial Stores, Ltd., [1904] A.C. at p. 211, *per* Lord LINDLEY.

Sheffield Masonic Hall Co., Ltd. v. Sheffield Corpn., [1932] 2 Ch. 17.

But, if the new light cannot be obstructed, its existence is important in determining whether the claimant's light is *de facto* reduced beyond a reasonable limit (*Dyers' Co. v. King, ubi supra*, at p. 442, *per* JAMES, V.C.). And (*semble*) if the substituted light is produced by the defendant's acts, it is an answer to the claim (*Davis v. Marrable*, [1913] 2 Ch. 421).

1177. The occupant of a building cannot, by increasing the size of his windows, increase his claim to light against his neighbours until he has acquired the increased light by prescription or grant. *Enlargement of windows*

Smith v. Evangelization Soc. (Incorporated) Trust, [1933] Ch. 515.

Sources of light of which the dominant owner cannot be deprived, such as vertical light through a skylight, must be taken into consideration in considering whether an easement of light has been obstructed.

*No rights of
prospect or
privacy*

1178. Neither a right of prospect, nor a right of privacy, is recognized by English law as an easement.^(a) But if a prospect is obstructed by an act which also amounts to a nuisance, special damages may be awarded for the obstruction of the prospect.^(b)

(a) *Broome v. Flower*, [1911] 1 Ch. at p. 225, *per* PARKER, J.

(b) *Campbell v. Paddington Corpn.*, [1911] 1 K.B. 869.

Support

1179. Rights of support recognized as easements by English law are (i) right to the support of buildings by subjacent or adjacent land,^(a) (ii) right to the support of buildings by subjacent or adjacent buildings.^(b)

(a) *Palmer v. Fleshees* (1663), 1 Sid. 167.

Dalton v. Angus (1881), 6 App. Cas. 740.

Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557.

The right to support of land by subjacent or adjacent land is a natural right of property. Land here includes a mineral of a fluid nature, such as pitch, wet sand or running silt, but not water. (*Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594.) But a right to support of buildings is a true easement (*Wilde v. Minsterley* (1639), 1 Roll. Abr. 564).

(b) *Richards v. Rose* (1853), 9 Exch. 218.

Caledonian Ry. Co. v. Sprot (1856), 2 Macq. 449 (approved in *Dalton v. Angus*, *ubi supra*, at p. 793, *per* Lord SELBORNE, C.).

In *Solomon v. Vintners' Co.* (1859), 5 H. & N. 585, it was said that no action will lie against the person who caused the fall by pulling down a house not next to the plaintiff's but separated from it by a third house. *Sed quaere*.

*Right to rest
chattels*

1180. An easement consisting of the right to place or fix chattels belonging to the owner of the dominant tenement upon the soil^(a) or buildings^(b) of a servient owner is recognized by English law.

(a) *Wood v. Hewett* (1846), 8 Q.B. 913 (hatch and fender in river).

Lancaster v. Eve (1859), 5 C.B.N.S. 717 (mooring post).

Hoare v. Metr. B. of Works (1874), L.R. 9 Q.B. 296 (signpost).

A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd., [1915] A.C. 599 (to place stores and casks upon land reclaimed from the sea).

(b) *Hawkins v. Wallis* (1763), 2 Wils. 173 (nailing trees to wall).

Gray v. Bond (1821), 2 Brod & Bing. 667 (land nets).

Moody v. Steggles (1879), 12 Ch. D. 261 (signboard).

Francis v. Hayward (1882), 22 Ch. D. at p. 182, *per* BOWEN, L.J. (name on fascia).

1181. A right of projection is a right to cause or allow buildings or chattels to project or be suspended over the servient tenement, for the benefit of the owner of the dominant tenement.^(a) Such a right cannot be acquired by prescription in respect of projecting trees.^(b) *Right of overhanging*

(a) *Drewell v. Towler* (1832), 3 B. & Ad. 735 (to hang clothes).

Suffield v. Brown (1864), 33 L.J. Ch. 249 (bowsprits projecting over quay).

Lemmon v. Webb, [1894] 3 Ch. at p. 11, *per* LINDLEY, L.J. (branches).

(b) *Lemmon v. Webb*, *ubi supra*.

And an action will lie against the owner of trees who allows them to overhang his neighbour's land to the damage of the latter's crops (*Smith v. Giddy*, [1904] 2 K.B. 448) or allows roots to spread underground and damage neighbour's wall. (*Butler v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 399).

1182. The owner of one tenement may be bound by grant or prescription to repair a fence or hedge between his land and a neighbouring tenement, for the benefit of the owners and occupiers of such neighbouring tenement. *Duty of repairing fence*

Star v. Rookesby (1710), 1 Salk. 335.

Boyle v. Tamlyn (1827), 6 B. & C. 329.

Lawrence v. Jenkins (1873), L.R. 8 Q.B. 274.

Coaker v. Willcocks, [1911] 1 K.B. 649.

This is one of the rare cases in which the owner of the servient tenement can be called upon to do an act for the benefit of the dominant tenement.

PROFITS À PRENDRE

1183. A profit à prendre is a right to enter and take some definite part of the profits of the soil from or off the land of another person.^(a) For this purpose, "profits of the soil" include herbage and natural vesture or produce of the soil, stone, sand, gravel, *Profit à prendre*

and other minerals, fish, turves or peat, wood, and game ; but not crops produced by human labour, or manufactured produce.^(b)

(a) *Manning v. Wasdale* (1836), 5 Ad. & El. at p. 764, *per* PATTESON, J.
Webber v. Lee (1882), 9 Q.B.D. 315.

Sutherland (Duke) v. Heathcote, [1892] 1 Ch. at p. 484, *per* LINDLEY, L.J.

Fitzhardinge (Lord) v. Purcell, [1908] 2 Ch. at p. 163, *per* PARKER, J.
R. v. Surrey County Court Judge, [1910] 2 K.B. 410.

(b) *Smart v. Jones* (1864), 15 C.B.N.S. 717 (where a right to dig and take away cinders was held not to be an interest in land).

There seems to be no reason to doubt that a claim to gather oysters *in alieno solo* could be established as a profit *à prendre* ; even though the oysters were artificially cultivated (*Goodman v. Saltash Corpn.* (1882), 7 App. Cas. at p. 637).

Vesture

1184. Rights to the vesture of the soil include rights of cutting and taking away heather and litter,^(a) sticks,^(b) rushes,^(c) thorns,^(d) and grass.^(e) By a grant of the "vesture" itself, all such rights will pass to the grantee, as well as the crops growing on the land.^(f)

(a) *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535.

(b) *Chilton v. London Corpn.* (1878), 7 Ch. D. 735.

Rivers (Lord) v. Adams (1878), 3 Ex. D. 361.

(c) *Bean v. Bloom* (1773), 2 Wm. Bl. 926.

(d) *Doevlass v. Kendal* (1610), Cro. Jac. 256.

(e) *Crosby v. Wadsworth* (1805), 6 East, 602.

(f) Co. Litt. 4 b.

At one time it seems to have been thought that a grant of "vesture" passed the property in the soil itself ; but this view was overruled (*Owning and Northmaston Tenants Case* (1587), 4 Leon. 43 ; *Anon.* (1588), Owen, 37). See, however, the *dicta* to the contrary in *Oxford's (Bishop) Case* (1621), Palm. 174. There may also be a grant of "first vesture" *Oxford's (Bishop) Case*, *ubi supra*.

Pasture

1185. Rights of pasture are either (i) several pasture,^(a) or (ii) common of pasture.^(b)

(a) Co. Litt. 4 a.

(b) *Ibid.* 122 a.

Several pasture

1186. Several pasture is the exclusive right to take the herbage of the servient tenement by the mouths of cattle or other beasts.^(a) A grant of a

several pasture does not of itself operate as a grant of the soil.^(b)

(a) *Sparke's Case* (1621), Win. 6.

Potter v. North (1669), 1 Saund. 346.

Johnson v. Barnes (1873), L.R. 8 C.P. 527

Robinson v. Duleep Singh (1878), 11 Ch. D. at p. 805, *per* FRY, J.

The owner of a several pasture may bring Trespass against an interloper, i.e. no proof of actual damage is necessary (*Robinson v. Duleep Singh*, *ubi supra* at p. 813, *per* JAMES, L.J.). He may also bring Ejectment (*Ward v. Petifer* (1634), Cro. Car. 362).

(b) Co. Litt. 4 a.

The language of Lord KENYON in *Burt v. Moore* (1793), 5 Term Rep. at p. 333, may seem to be somewhat inconsistent with this doctrine. But the facts in that case were peculiar; and COKE's assertion is not seriously questioned.

1187. Common of pasture is the right to take, in *Common of*
common with the owner of the servient tenement, *pasture*
and with or without other persons, the herbage of
the servient tenement by the mouths of cattle or
other beasts.^(a) Such a right may be for a limited
("stinted common") or unlimited number of beasts
("common *sans nombre*"),^(b) or for a particular class
or classes of beasts.^(c) But common of pasture append-
ant or appurtenant cannot be *sans nombre*.^(d)

(a) Co. Litt. 122 a.

(b) *Richards v. Squibb* (1698), 1 Ld. Raym. 726.

Brook v. Willet (1793), 2 Hy. Bl. 224.

(c) *Jones v. Richard* (1837), 6 Ad. & El. 530.

(d) *Bennett v. Reeve* (1740), Willes, 227.

Benson v. Chester (1799), 8 Term Rep. 396.

Baylis v. Tyssen-Amhurst (1877), 6 Ch. D. at p. 507, *per* JESSEL, M.R.

The cases in which common *sans nombre* has been allowed in respect of appendant or appurtenant rights, are to be explained by assuming that, in such cases, common *sans nombre* merely means common for all commonable beasts *levant and couchant* (i.e. such a number as can be maintained in the winter) on the dominant tenement (*Chichly v.*— (1658), Hard. 117; *Morley v. Clifford* (1882), 20 Ch. D. at p. 757, *per* FRY, J.). By "maintained in the winter" is meant being fed during the winter on the food produced by the dominant tenement during the summer (*Robertson v. Hartopp* (1889), 43 Ch. D., at p. 516, *per* Curiam). In *Mellor v. Spateman* (1669), 1 Saund. 343, it was held, that even common in gross could not be

sans nombre ; but this doctrine seems not to have been followed (see *Weekly v. Wildman* (1698), 1 *Ld. Raym.* at p. 407, *per* POWELL, J.). The property legislation of 1922-6 has by no means abolished common of pasture (*L.P.A.*, 1922, Sched. XII, (4)).

Pannage

1188. A right of pannage or pawning is a right to take the droppings of oak, beech, and other trees growing on the servient tenement, by the mouths of hogs or swine.

Chilton v. London Corpn. (1878), 7 *Ch. D.* at p. 565, *per* JESSEL, M.R.

The existence of this right does not prevent the owner of the trees lopping them, or even cutting them down when ripe (*Chilton v. London Corpn.*, *ubi supra*).

Foldage

1189. A right of foldage is a right to have all or some of the sheep belonging to the owner of the servient tenement folded on the dominant tenement for the purpose of manuring it.

Anon. (1485), Y.B. 1 *Hen. VII.* fo. 24, pl. 17.

Anon. (1489), Y.B. 5 *Hen. VII.* Mich. pl. 22.

Dickman v. Allen (1690), 2 *Vent.* 138.

Brook v. Willet (1793), 2 *Hy. Bl.* 224.

This right is not infrequently confused with the right of *fold-course*, which is simply an instance of common of pasture for a certain number, or unlimited number, of sheep (*Dickman v. Allen*, *ubi supra* ; *Robinson v. Duleep Singh* (1878), 11 *Ch. D.* 798). In the case of 1 *Hen. VII.* it was suggested that there could be no right of foldage in gross ; because the whole object of the right was to improve the land of the owner of the right. But the point was not decided. It appears from *Brook v. Willet*, *ubi supra*, that the right may exist as a condition of a right of common of pasture.

Mineral rights

1190. Rights to minerals include the common or exclusive right ^(a) of digging or quarrying for stone,^(b) clay,^(c) gravel,^(d) sand,^(e) coal,^(f) and other minerals, in or under the servient tenement.

(a) It may be questioned whether a claim which virtually asserted the right to destroy the servient tenement would be good, at any rate by prescription (*Clayton v. Corby* (1843), 5 *Q.B.* 415 ; *Hilton v. Granville (Earl)* (1844), *ibid.* 701). But see *Salisbury (Marquis) v. Gladstone* (1860), 6 *H. & N.* 123, which was, however, a claim by copyholders. It will be realized that a claim may be limited,

and yet exclusive (*Sutherland (Duke) v. Heathcote*, [1892] 1 Ch. at p. 484).

- (b) *Maxwell v. Martin* (1830), 6 Bing. 522.
- Constable v. Nicholson* (1863), 14 C.B. (N.S.) 230.
- (c) *Salisbury (Marquis) v. Gladstone* (1860), 6 H. & N. 123.
- (d) *Duberley v. Page* (1788), 2 Term Rep. 391.
- (e) *Duberley v. Page*, *ubi supra*.
- Blewett v. Tregonning* (1835), 3 Ad. & El. 554.
- (f) Co. Litt. 122 a.

It must be carefully noted, that the *ownership* of mines, i.e. mineral-bearing strata, is not an incorporeal but a corporeal hereditament, and cannot be claimed by prescription (*Wilkinson v. Proud* (1843), 11 M. & W. 33). Neither could it pass by grant before 1845 (*Sutherland (Duke) v. Heathcote*, *ubi supra*, at p. 483). It is the right to search for and take away minerals in and from the soil of another, which is incorporeal.

1191. Rights to fish (other than franchise or *Fishing* ownership rights) are (i) several fishery in non-tidal waters, and (ii) common of piscary.

The inconsistency in the use of words to describe fishing rights has been mentioned previously, and the practice adopted in this work explained (see *ante*, § 1159, n.).

1192. A several fishery is the exclusive ^(a) right *Several fishery* of fishing in non-tidal water covering the soil of the servient tenement, and taking away the fish caught.^(b) Such a right is presumed to include the ownership of the soil of the servient tenement; but this presumption may be rebutted.^(c)

- (a) Exclusive means that no other person has a co-extensive right with the owner. A partial independent right in another, or a limited right does not destroy the severalty of the fishery (*Seymour v. Courtenay* (1771), 5 Burr. at p. 2817, *per Curiam*).
- (b) Co. Litt. 122 a.
- (c) *Smith v. Kemp* (1693), 2 Salk. 637, *per Lord Holt*, C.J.
- Scrutton v. Brown* (1825), 4 B. & C. 485.
- Holford v. Bailey* (1849), 13 Q.B. 426.
- Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732.
- Hanbury v. Jenkins*, [1901] 2 Ch. at p. 411, *per BUCKLEY*, L.J.

This point has been the subject of acute controversy; and the rule in the text is alleged (e.g. by COCKBURN, C.J., in *Marshall v. Ulleswater, etc. Co.*, *ubi supra* at p. 747) to be inconsistent with a well-known passage in Coke (Co. Litt. 4 b), where Coke says that on

a grant of *separalis piscaria* "the soile doth not passe". But there appears to be no inconsistency. If an actual grant is produced, and a grant of a "fishery" (without more) is shown, Coke's rule applies (see *Hindson v. Ashby*, [1896] 2 Ch. at p. 10, *per* LINDLEY, L.J.; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554). But if the claimant relies on a presumed conveyance, it will be presumed that this conveyance contained words apt to pass the soil (*Somerset (Duke) v. Fogwell* (1826), 5 B. & C. at p. 886, *per* Curiam). In such cases, of course, the owner of the right can bring Trespass against an intruder (*Holford v. Bailey*, *ubi supra*); and, probably, the same rule applies where the soil is not included (*Hindson v. Ashby*, *ubi supra*). He can also, as we have seen, seize the boats, gear, and tackle of the intruders, as damage feasants (*Reynell v. Champernoou* (1631), Cro. Car. 228). It is difficult, however, to understand how anyone could prescribe for such rights; for they really amount to a corporeal hereditament.

*Change of
river-bed*

1193. The owner of a several fishery in a non-tidal river which gradually changes its course, is not by such change deprived of his exclusive right of fishing in the river; even though the ancient boundaries of the river can be traced.

Foster v. Wright (1878), 4 C.P.D. 438.

Semble, the same rule applies to common of piscary. In this case, the Court distinguished the *Carlisle Corpn. v. Graham* (1869), L.R. 4 Exch. 361 (*ante*, § 1161).

*Common of
piscary*

1194. Common of piscary is the right of fishing, in common with the owner or occupier of the servient tenement, and with or without other persons, in water covering the soil of the servient tenement.

Co. Litt. 122 a.

Smith v. Kemp (1693), 2 Salk. 637.

The cases in which common of piscary has been actually recognized seem to be singularly few; except in the case of copyholders, whose rights could not be treated as exactly equivalent to incorporeal hereditaments, though on enfranchisement such rights might become true incorporeal hereditaments (*Tilbury v. Silva* (1890), 45 Ch. D. 98). Was the right established in *Fitzgerald v. Firbank*, [1897] 2 Ch. 96 ("exclusive right of fishing" with rod and line) common of piscary or several fishery?

Turbary

1195. Common of turbary is the right of taking, in common with other persons, sufficient quantity

of turves or peat for the purposes of a messuage to which the right is appendant or appurtenant.^(a)
Semble, there cannot be common of turbary in gross.^(b)

(a) *Peardon v. Underhill* (1850), 16 Q.B. 120.

Lascelles v. Oslow (Lord) (1877), 2 Q.B.D. 433.

(b) *Tyrringham's Case* (1584), 4 Co. Rep. at 37 a.

The destruction of an ancient messuage, to which rights of turbary and estovers were appurtenant, does not, necessarily, extinguish such rights, which may attach to a new messuage built to replace the old ; provided that the change does not impose an additional burden on the servient tenement (*A.-G. v. Reynolds*, [1911] 2 K.B. 888 (reviewing authorities)). There is a conflict of opinion as to whether common of turbary can be appendant.

1196. Common of estovers is the right of taking *Estovers* sufficient wood from the trees growing on the servient tenement for the repair and fuel of the messuage to which the right is appurtenant. Such a right does not prevent the owner of the servient tenement making his profit of the wood ; but if he does not leave sufficient to satisfy the right of estovers, an action for damages will lie against him.

Nevil's Case (1570), 1 Plowd. at p. 381.

Luttrell's Case (1601), 4 Co. Rep. at p. 87 a.

Basset v. Maynard (1601), Cro. Eliz. at 820.

Arundel (Countess) v. Steere (1604), Cro. Jac. 25.

The last case shows that a claim of estovers for building new houses on the same tenement may be supported by prescription provided no additional burden is placed on the owner of the wood.

1197. Rights to game (other than fish) are rights, *Game* exclusive or non-exclusive, of hunting, hawking, coursing, fowling, shooting, and taking away, beasts and birds upon land in the occupation of another person.^(a) Any such right is now subject to the co-existing right of the occupier of the servient tenement (including the owner if he is also occupier) to kill ground game under the Ground Game Act, 1880, and the Ground Game (Amendment) Act, 1906.^(b)

(a) *Wickham v. Hawker* (1840), 7 M. & W. 63.

Ewart v. Graham (1859), 7 H.L.Cas. 331.

Jeffryes v. Evans (1865), 19 C.B.N.S. 246.

Gearns v. Baker (1875), 10 Ch. App. 355.

Morgan v. Jackson, [1895] 1 Q.B. 885.

Lorve v. Adams, [1901] 2 Ch. 598.

The extent of the right is a question of construction in each case (*Moore v. Plymouth (Earl)* (1817), 7 Taunt. 614); or, *semble*, if the claim is by prescription, a question of fact for the jury. "Game," for the purposes of this §, of course, includes much more than "game" with which the Game Licences Act, 1860, deals.

(b) 43 & 44 Vict. (1880), c. 47.

6 Edw. VII (1906), c. 21.

Stanton v. Brown, [1900] 1 Q.B. 671.

Anderson v. Vicary, [1900] 2 Q.B. 287.

As to the compensation claimable by a tenant for damage to his crops by game, the right to take and kill which is not vested in him, see *ante*, § 765. A grant of a true profit *à prendre* must be carefully distinguished from a mere licence to shoot.

*Right of
servient
owner*

1198. An occupier over whose land a right of sporting exists may, in the absence of express agreement to the contrary, do any act for the *bonâ fide* management of his land; notwithstanding that such act may incidentally prejudice the sporting right. This rule does not extend to acts done with the express intention of causing such prejudice,^(a) nor (*semble*) to acts which substantially alter the character of the land to the detriment of the sporting right.^(b)

(a) *Jeffryes v. Evans* (1865), 19 C.B. (N.S.) 246.

Gearns v. Baker (1875), 10 Ch. App. 355.

(b) *Peech v. Best*, [1931] 1 K.B. 1. (But this was a case of express grant, from which, it was held, the defendant could not derogate.)

*Rights of
sportsmen*

1199. The person in whom a right of sporting is vested may do any acts upon the servient tenement which are reasonably necessary for preserving the enjoyment of such right; even though such acts are *primâ facie* unlawful.

Cope v. Sharpe (No. 2), [1912] 1 K.B. 496. ("Reasonably necessary" means such a state of facts that a reasonable man would have done what the defendant did. In this case the defendant's servant set fire to heather on the servient tenement.)

*Overloading
with game*

1200. The person in whom a right of sporting is

vested is liable to an action for damages and, if necessary, an injunction, by the occupier of the servient tenement, if the owner of the right of sporting, by artificial means, so increases the game on the servient tenement as to cause damage to the crops grown thereon. *Semble*, if he does, the occupier may also destroy the excess of game.

Birkbeck v. Paget (1862), 31 Beav. 403.

Farrer v. Nelson (1885), 15 Q.B.D. 258.

ADVOWSONS

Advowsons are still clearly treated as property in land by the legislation of 1922-6 (see L.P.A., 1925, s. 201).

1201. An advowson is the perpetual right of *Advowson* patronage of an ecclesiastical benefice.^(a) Advowsons may be either "presentative" (where the right is only to present a fit clerk to the bishop of diocese),^(b) or "collative" (where the bishop has the right both to nominate and to institute).^(c)

(a) Co. Litt. 17 b.; 119 b.

A.-G. v. Exeter Hospital (1853), 17 Beav. at p. 383, *per* ROMILLY, M.R.

In the last case, it was suggested by the Court that the word "advowson" would, at one time, also have included the right of nomination to a benefice not strictly ecclesiastical, e.g. eleemosynary or academic.

(b) But where a fit clerk is presented, the right is legal and absolute (*Exeter (Bishop) v. Marshall* (1868), L.R. 3 H.L. 17), subject now to the duties of the patron under s. 1 of the Benefices (Transfer of Rights of Patronage) Measure, 1930. It is even said that it may be exercised by word of mouth (*A.-G. v. Brereton* (1752), 2 Ves. Sen. at p. 429, *per* Lord HARDWICKE, C.).

(c) There was formerly a third kind of advowson, called "donative", by virtue of which the patron nominated, instituted, and inducted. But these are now, if accompanied by cure of souls, converted into advowsons presentative by the Benefices Act, 1898, s. 12.

An advowson, though a "hereditament", and even a "tenement", is not properly described as being "situate at" any particular

place ; though it may pass under such a description, if the whole of the circumstances and expressions of the conveyance point to that conclusion (*Crompton v. Farratt* (1885), 30 Ch. D. 298). An advowson may be seized to satisfy the debts of its owner, both during his lifetime (Judgments Act, 1838, s. 11) and after his death (*Tong v. Robinson* (1730), 1 Bro. Parl. Cas. 114). But the creditors' rights are now, presumably, subject to the restrictions on the sale of advowsons imposed by the Benefices Act, 1898 (*post*, §§ 1202-1234), as well as to provision for the needs of the benefice.

*Restraints
on transfer*

1202. No transfer of an advowson is valid unless—

- (i) it is registered in the prescribed manner in the registry of the diocese (? in which the church is situated) within one month from the transfer, or such other time as the bishop may think fit to allow ;
- (ii) it transfers the whole interest of the transferor (except that a life interest may be reserved to the settlor in a family settlement, and a right of redemption may be reserved in a mortgage) ;
- (iii) more than twelve months have elapsed since the last institution or admission to the benefice.

Benefices Act, 1898, s. 1 (1).

This enactment put an end to the practice of alienating "next presentations" ; at one time very common. *Seemle*, such rights of next presentation as still exist may be exercised, subject to the provisions of the Act. A "transfer" does not include any transmission by operation of law, nor a transfer on the appointment of new trustees, where no beneficial interest passes (*ibid.* (6)).

*No separate
sale by
auction*

1203. No advowson may be offered for sale by public auction, except in conjunction with a manor,^(a) or with an estate in land of not less than one hundred acres situate in the same parish as the benefice, or an adjoining parish, and belonging to the owner of the advowson.^(b)

- (a) Does this mean strictly appendant or appurtenant to the manor ; or merely in the same ownership ? In the severer restriction upon the

transfer of advowsons contained in the Benefices Act, 1898 (Amendment) Measure, 1923, the word used is "appendant".

(b) Benefices Act, 1898, s. 1 (2).

Breach of this rule renders the breaker liable to a penalty of £100, recoverable on summary conviction (*ibid.*). This and the other restrictions imposed on dealings with advowsons by the Benefices Act, 1898, or any other statute or measure, are not affected by the provisions of the Law of Property Act, 1925 (see s. 201 (2) of that Act).

1204. No disposition of an advowson by sale or *Future sales* for valuable consideration will be valid if made after the occurrence of two vacancies of the benefice after 14th July 1924.

Benefices Act, 1898 (Amendment) Measure, 1923, s. 1.

A patron beneficially entitled to an advowson in fee simple (legal or equitable) or in tail may by sealed declaration duly registered in the registry of the diocese render the advowson unsaleable as from the date of such registration (*ibid.* s. 2) New Parishes Measure, 1943.

1205. No agreement for the exercise of a right *Next presentations and resignations* of ecclesiastical patronage in favour or on the nomination of any particular person, is valid; nor is any agreement on the transfer of an advowson valid which contemplates:—

- (i) the re-transfer of the advowson;
- (ii) the postponement of the payment of the consideration for such transfer, or the payment of interest, until a vacancy, or for more than three months;
- (iii) any payment in respect of the date at which a vacancy occurs;
- (iv) the resignation of a benefice in favour of any person.

Benefices Act, 1898, s. 1 (3).

This clause aims at putting an end both to the purchase of "turns" with a view of presenting the purchaser, and the gift of a living to be held until another candidate is ready. The latter object was achieved until recently by the execution by the clerk presented of

a "resignation bond", by which he undertook to resign the living on the occurrence of a certain event or events. This practice was actually legalized, to a limited extent, by the Clergy Resignation Bonds Act, 1828. But that Act was repealed by s. 5 of the Benefices Act, 1898 (Amendment) Measure, 1923; and a "resignation bond" is now, presumably, void.

*Vacant
benefice*

1206. A transfer by act of a private person of a vacant benefice cannot pass the right to present to the existing vacancy.

Stephens v. Wall (1569), 3 Dyer, 282 b.

Fox v. Chester (Bishop) (1829), 6 Bing. at p. 17, *per* BEST, C.J.

The rule has no application to the Crown (*Stephens v. Wall, ubi supra*); but, even on a grant by the Crown, the next presentation to the existing vacancy will not pass unless expressly named (*Case of Bedminster Manor* (1571), 3 Dyer, 300 a; *Weston's Case* (1576), *ibid.* 347 a). The vacant turn remains with the grantor or his personal representative (*Stephens v. Wall, ubi supra*).

"Appurtenances"

1207. By the grant of a manor with its appurtenances by the Crown, an advowson which is appendant to the manor does not pass; unless it is expressly included in the grant.^(a) A similar rule holds in the case of a demise for years of a manor by a private person, without mention of "appurtenances".^(b)

(a) *De Praerogativa Regis (Temp. Inert)*, c. 17.

Gorge's and Dalton's Case (1587), 3 Leon. 196.

Whistler v. Oxford (Bishop) (1613), 10 Co. Rep. 63 a.

(b) *Higgins v. Grant* (1583), Cro. Eliz. 18.

Presumably, in spite of the words of the so-called statute, the doctrine applies to advowsons appendant. *Quaere*: Can there be an advowson appurtenant? By a temporary severance of an advowson from a manor the advowson becomes a gross; but on re-union with the manor, it becomes once more appendant (*Ive's Case* (1597), 5 Rep. at p. 11 b; *Hartopp and Cook's Case* (1627), Hut. 88; *Rooper v. Harrison* (1855), 2 K. & J. at p. 109, *per* WOOD, V.C.). For the general rule about the passing of rights appendant or appurtenant on a conveyance of the dominant tenement, see *ante*, § 1124.

Simony

1208. Any purchase of a next presentation by a clerk with a view to his own presentation, renders such presentation void, and is a cause of forfeiture

of the turn to the Crown.^(a) But the owner of an advowson, however small his interest,^(b) or of the next presentation,^(c) may, subject to s. 3 of the Benefices Act, 1898 (Amendment) Measure, 1923,^(d) offer himself or other fit clerk to the bishop for institution.

- (a) Simony Act, 1713, s. 2. (Of course this provision is, so far as future transactions are concerned, rendered practically unnecessary by s. 1 (1) of the Benefices Act, 1898 (*ante*, §1205), which makes the sale of a next presentation void in any circumstances.)

Lee v. Merest (1869), 39 L.J. Eccl. 53.

- (b) *Sherrard v. Harborough (Lord)* (1753), Amb. at p. 166, *per* Lord HARDWICKE, C.

Albemarle (Earl) v. Rogers (1796), 7 Bro. Parl. Cas. 522 (estate for years).

Walsh v. Lincoln (Bishop) (1875), L.R. 10 C.P. 518 (estate *pur autre vie*).

Lowe v. Chester (Bishop) (1883), 10 Q.B.D. 407.

- (c) *Harris v. Austin* (1615), 3 Bulst. 36.

- (d) This section provides that where the right of patronage has been transferred after 14th July 1923, to a person who is then, or subsequently becomes, a clergyman, or to his wife, or to some one on his or her behalf, such clergyman shall not be presented to the benefice.

1209. Where a beneficed clerk is promoted by the Crown, the right to present to the vacancy caused by his promotion passes to the Crown. But the owner of the next presentation, who has thus been deprived of his turn, may present to the next vacancy of the benefice.^(a) The fact that the Crown has itself previously sold the advowson to a private person, does not deprive the Crown of the right to present on a vacancy caused by promotion.^(b)

Lapse to Crown by promotion

- (a) *Troward v. Calland* (1796), 8 Bro. Parl. Cas. 71.

- (b) *R. v. Eton College* (1857), 8 E. & B. 610 (*dictum*).

The prerogative of the Crown does not extend to a vacancy caused by the promotion of an incumbent to a colonial bishopric erected and constituted solely by the exercise of the prerogative. *Quære* : as to a bishopric constituted under Act of Parliament (*R. v. Eton College, ubi supra*).

1210. No Roman Catholic may present to any ecclesiastical benefice (of the Church of England) ;

Patronage of Catholics and Jews

and no person holding an advowson or right of presentation in trust for a Roman Catholic, may present any clerk to such benefice.^(a) No Jew may exercise official ecclesiastical patronage, or advise the Crown with regard to the exercise of such patronage.^(b) The right to exercise Anglican ecclesiastical patronage vested in or held in trust for Roman Catholics, belongs to the Universities of Oxford and Cambridge;^(c) the right to exercise the ecclesiastical patronage of an office under the Crown held by a Jew, belongs to the Archbishop of Canterbury for the time being.^(d)

- (a) 1 & 2 W. & M. (1688), c. 26, ss. 1 & 2 (affirming 3 Jas. I (1605), c. 5), which gives the division between the universities.

Presentation of Benefices Act, 1713, s. 1.

Church Patronage Act, 1737, s. 5. (This Act avoids all transfers of advowsons by Catholics, other than *bonâ fide* sales to Protestant purchasers.)

Roman Catholic Relief Act, 1829, s. 16.

- (b) Jews Relief Act, 1858, s. 4.

- (c) 3 Jas. I (1605), c. 5.

Benefices Act, 1898, s. 7.

- (d) Jews Relief Act, 1858, s. 4.

*Lapse on
vacancy*

1211. If the patron of an ecclesiastical benefice allows it to remain vacant for six calendar months, the ordinary of the diocese (not being himself the patron) may present and institute at any time within the next six months.^(a) If such ordinary does not present within such period, or is not entitled to present, the archbishop of the province (not being patron or ordinary) may present at any time within a further period of six months.^(b) If such archbishop is not entitled to present, or does not present, within such further period, the right of presentation for that turn lapses to the Crown.^(c) But the patron may present at any time before the benefice has been filled.^(d)

- (a) Statute of Provisors (25 Edw. III (1351), st. 4).

Ordinance for the Clergy (25 Edw. III (1351), st. 6), c. 7.

York (Archbishop) and Willock's Case (1753), 3 Dyer, 327 b.
Catesby's Case (1607), 6 Co. Rep. 61 b.

If the vacancy is caused by resignation or deprivation, the patron's period only begins to run from receipt by him of notice of the vacancy (13 Eliz. (1571), c. 12, s. 7; Clergy Discipline Act, 1892, s. 6 (3)). So also, if the bishop refuses the patron's presentee for illiteracy (but not for crime), the period of lapse will be suspended until notice of such refusal is given to the patron (*Hele v. Exeter (Bishop)* (1693), 2 Salk. 539).

- (b) *Grendon v. Lincoln (Bishop)* (1575), 2 Plowd. at p. 498, *ad fin.*
Lancaster v. Lowe (1605), Cro. Jac. at p. 93.
- (c) Statute of Provisors, *ubi supra*.
- (d) *R. v. Winton (Bishop) and Champion* (1604), Cro. Jac. 53.
Boorton v. Rochester (Bishop) (1618), Hut. 24.

There appears to be some doubt whether a presentation by the patron is good if the turn has lapsed to the Crown (*Cumber v. Chichester (Bishop) and Green* (1609), Cro. Jac. 216). Where there has been a refusal of the bishop to institute or admit, the period which has elapsed between the presentation and the refusal is not counted for purposes of lapse; nor, if there is an appeal against the refusal, is the time between refusal and the decision of the appeal counted (Benefices Act, 1898, s. 5). The question of vacancy or plenarty of the benefice is for the ecclesiastical court (25 Edw. III (1351) st. VI, c. 8).

TITHE RENT CHARGE

Note

Tithe rent charge was an annual sum of money charged upon and issuing out of land formerly subject to a claim of tithes, in lieu of such tithes (*Walsh v. Trimmer* (1867), L.R. 2 H.L. 208. L.P.A., 1925, s. 1 (2) (d)).

Tithes, or the tenth part of the produce of land, were claimable as of common right by the ordinary of the parish from all land therein, i.e. it was presumed that all land was subject to the claim. Many exemptions were, however, recognized, e.g. certain lands formerly held by ecclesiastical corporations were exempt; a *modus* or composition in lieu of tithe might be validly agreed on; or, simply as the result of long *de facto* exemption (fixed by the Tithe Act, 1832, s. 1, at sixty years, or two occupations of the claimant's benefice and three years more, whichever is the longer period), a legal release might be presumed. Tithes were described as "great", i.e. those of hay, corn, and wood, or "small" (or "privy"), i.e. those of other produce. The former, or the equivalent for them, might be in lay hands, which fact makes them properly the subject of this work. The inconveniences attendant upon the taking of tithes in kind led to the passing of a series

of statutes (known as the Tithe Acts, 1836 to 1925) having for their object the commutation of tithes in kind into an annual rent charge, varying with the price of corn, formerly the chief subject of tithe. It will be noted, however, that the commutation was of the liability to tithes, not of the tithe actually taken ; and, consequently, as new land was brought into cultivation, it became liable to tithe rent charge (*Walsh v. Trimmer, ubi supra*). It should be noted also, that the Commutation Acts did not apply to tithes of fish or fishing, personal tithes, or mineral tithes ; except where there was a parochial agreement approved by the Board of Agriculture and Fisheries (Tithe Act, 1836, s. 90), by which body the commutation of tithes was later effected (Board of Agriculture Act, 1889, s. 2, and Sched. I, Pt. II). It will be noted that, for the ownership of tithe rent charge to be a legal interest, there is no requirement of perpetuity or term of years absolute in the L.P.A., 1925, s. 1 (2) (d). The Tithe Act, 1936, extinguished tithe rent charge as from the 2nd October 1936, and land out of which tithe rent charge formerly issued is discharged and freed therefrom. Such land is now charged with a " tithe redemption annuity " payable to the Crown, and the landowner, i.e. the estate owner in fee simple, unless the land has been leased for a term exceeding fourteen years at a rent less than a rack rent, in which case he is the estate owner of the term of years, is personally responsible therefor. A redemption annuity is a debt due to the Crown and is to be paid by the landowner notwithstanding any contract between him and the occupier. It is recoverable by proceedings in the High Court or in the County Court or any other means whereby a debt due to the Crown may be recovered, and where it is less than £50, may be recovered summarily as a civil debt. It is a legal interest and is not registrable under the L.C.A., 1925. The amount of the annuity is £91-11-2 per £100 commuted value of rent charge if any of the land was agricultural land on 1st April 1936 ; £105 per £100 commuted value of rent charge in other cases. For agricultural land, the Act has reduced the annual payment per £100 commuted value from £109-10-0 to £91-11-2 in the case of ecclesiastical tithe rent charge (i.e. one payable to some church authority), and from £105-0-0 to £91-11-2 in the case of lay tithe rent charge. In the case of non-agricultural land ecclesiastical tithe rent charge has been reduced by £4-10-0, otherwise it is unchanged. The annuities are payable for sixty years and then cease. From these payments a fund will be formed out of which the tithe redemption stock will be redeemed. The tithe owners are compensated by the issue to them of " tithe redemption stock " with interest at 3 per cent. This stock is charged on the Consolidated Fund, payment is guaranteed by the Government and is redeemable within sixty years. Tithe redemption annuities are distinguishable from an ordinary rent charge in that the statutory remedies for the recovery of rent charges and the statutory provisions for redemption and apportionment are not generally applicable

(L.P.A., 1925, ss. 121, 191, 192. Tithe Act, 1936, ss. 13 (9), 16 (6)). For details of tithe rent charge before 1936 see previous edition, pp. 633-639.

RENT CHARGE (OTHER THAN TITHE RENT CHARGE)

1212. A rent charge (not being a tithe rent *Rent charge* charge) is an annual sum of money or other render charged on and issuing out of land, or an estate in land, and payable by the terre-tenant of the land, but not by way of service to a reversioner.^(a) Only a rent charge in possession, being perpetual or for a term of years absolute, and not being a rent charge of the kind described in s. 1 (1) (v) of the Settled Land Act, 1925,^(b) can be a legal interest.^(c)

(a) Litt. s. 218.

Co. Litt. 143 b-147 b.

(b) *Re Austen*, [1929] 2 Ch. 155. (The decision seems rather strange, as the charges described in the subs. are "for the life of any person or any less period").

(c) L.P.A., 1925, s. 1 (2) (b). A rent charge (not being a rent charge limited to take effect in remainder after or expectant on the failure or determination of some other interest) is a rent charge in possession, notwithstanding that payments in respect thereof are limited to commence or accrue at some time subsequent to its creation (Law of Property (Entailed Interests) Act, 1932, s. 2).

Rents charge played a much more important part in former times than since the repeal of the Usury Acts and the appearance of many other forms of investment have rendered them of less importance. They were contrasted from early times with rents service, i.e. rents reserved on the creation of tenure. Most of the rent services reserved on the grant of a fee simple in freehold land prior to the Statute *Quia Emptores*, 1290, have, owing to the fall in the value of money remained uncollected for so long as to become barred by lapse of time. Such rents were known as chief rents in the case of freehold land, and those existing in 1925 were classed with manorial incidents in copyhold land and were extinguished by the end of 1935 (L.P.A., 1922, ss. 128 (2), 138, 13th Sched. Pt. II, 11). Rents not incident to tenure could not be recovered by distress at the common law; unless they were granted with a clause giving a right of distress, in which latter case the rent was known as a "rent charge", while a rent not recoverable by distress was known as a "rent seck". The passages from Littleton and Coke above referred to, however, show that the grant of an express power of distress to recover a non-tenurial rent was

well known in the fifteenth century ; though it is only comparatively recently that such power has been made independent of express grant. The distinction between rents charge (in the older sense) and rents seck is now obsolete (Landlord and Tenant Act, 1730, s. 5). A power of distress given by way of indemnity against a rent payable in respect of any land (*semble*, whether rent service or rent charge) or against the breach of any covenant or condition in relation to land, is not a bill of sale within the meaning of the Bills of Sale Acts ; and the benefit of all covenants and powers given by way of indemnity against a rent payable in respect of land, or against the breach of any covenant or condition in relation to land, is deemed to have been annexed to the land to which the indemnity is intended to relate, and may be enforced by the estate owner for the time being of the whole or any part of that land (L.P.A., 1925, s. 189).

*Personal
liability of
terre-tenant*

1213. In addition to the statutory remedies of distress and eviction, and any equitable remedy in respect of the land (*post*, § 1398), the person entitled to a rent charge may, in the absence of express provision to the contrary, recover the amount thereof from the terre-tenant of the land (including a mortgagee) by action of debt.

Litt. ss. 219, 220, 233, 238.

Co. Litt. 144 b-147 b.

Thomas v. Sylvester (1873), L.R. 8 Q.B. 368.

Christie v. Barker (1884), 53 L.J. (Q.B.) 537.

Pertwee v. Townsend, [1896] 2 Q.B. 129.

Re Herbage Rents, Greenwich, Charity Commissioners v. Green, [1896] 2 Ch. 811.

Foley's Charity Trustees v. Dudley Corpn., [1910] 1 K.B. 317.

Cundiff v. Fitzsimmons, [1911] 1 K.B. 513.

Presumably the terre-tenant is only liable for rent which accrues due during his tenancy (*Fairfax (Lord) v. Derby (Lord)* (1708), 2 Vern. 612). But, subject to that restriction, his liability is not limited by the value of the profits which he has actually received (*Re Herbage Rents, Greenwich, Charity Commissioners v. Green, ubi supra* ; *Foley's Charity Trustees v. Dudley Corporation, ubi supra*). And an owner of part of the land subject to the charge can be sued in respect of the whole arrears (*Booth v. Smith* (1884), 14 Q.B.D. 318) ; being left to his action to recover a proportion from the owners of the rest (*Christie v. Barker, ubi supra*). But a tenant for years at a rack rent is not a " terre-tenant " for purposes of this section (*Re Herbage Rents, Greenwich, Charity Commissioners v. Green, ubi supra*) ; though a mortgagee in fee is, even though he has never entered (*Cundiff v. Fitzsimmons*, [1911] 1 K.B. 513). It is said by Coke

(Co. Litt. 144 b) that no personal remedy lies for the recovery of a rent granted for "owelty" (equality) of partition, or of such a rent as can be created without deed.

1214. A person entitled to an annual sum charged on land, by way of rent charge or otherwise, not being rent incident to a reversion, created since 1881 may, subject to all interests having priority to the charge, and subject to any contrary intention expressed in the instrument creating the charge, when the annual charge is in arrear for twenty-one days enter into and distrain on the land and dispose according to law of any distress found, for all arrears.^(a) If the charge is in arrear for forty days, the person entitled to receive the same, may enter upon the land, and retain possession until his claim has been satisfied out of the incomings of the land,^(b) or may demise the land to a trustee for a term of years, who may, by mortgage or sale of the term thereby recover the amount of the charge, and arrears thereof, and all future payments to become due under the same, for the benefit of the claimant.^(c) A person entitled to a rent charge created before 1881, may distrain for arrears ; but has not the other remedies specified above ^(d).

(a) L.P.A., 1925, s. 121 (1) (2).

(b) *Ibid* (3).

(c) *Ibid* (4).

(d) Landlord and Tenant Act, 1730, s. 5.

Where a rent charge is charged on another rent charge, the above remedies are excluded and replaced by a right in the rent owner to appoint a receiver of the annual sum charged whenever payment is in arrear for twenty-one days (L.P.A., 1925, s. 122).

The remedies given by the L.P.A., 1925, s. 121, are strictly confined to the extent to which these remedies "might have been conferred by the instrument under which the annual sum arises". *Quaere* : Can the owner of a rent charge distrain on the goods of strangers ? For an anticipation by the Court of Chancery of part of these statutory remedies, see *Foster v. Foster* (1700), 2 Vern. 386.

1215. In addition to the remedies described in *Equitable remedies*

§§ 1213 and 1214, the Court, in the exercise of its equitable jurisdiction, may, on the application of the owner of the rent charge, order a sale or mortgage of the estate out of which the rent charge issues, in order to raise arrears thereof.

Cupitt v. Jackson (1824), 13 Price, 721.

Hambro v. Hambro, [1894] 2 Ch. 564.

In both these cases the settlements were made before 1882 ; but, though the decision in the latter was given many years after the passing of the Conveyancing Act, 1881, the Court made no exception in respect of rent charges coming within s. 44 of that Act.

*No action of
waste by
rent-charger*

1216. The owner of a rent charge cannot bring an action to restrain waste by the terre-tenant.

Sandeman v. Rushton (1891), 61 L.J. Ch. 136.

*Release of
part of land*

1217. On the release by the owner of the rent charge of a portion of the land on which it is chargeable, the owner or owners of the residue of the land charged will be liable to pay (only) such part of the charge as is proportionate to such residue.^(a) This paragraph applies (only) to releases made after the 12th August 1859.^(b)

(a) Co. Litt. 148 a.

L.P.A., 1925, s. 70 (1).

Booth v. Smith (1884), 14 Q.B.D. 318.

(b) L.P.A., 1925, s. 70 (2). (The word "only" does not occur in the subsection.)

If the owner of the unreleased part of the land joins in the release, his part remains liable for the whole charge (*Price v. John*, [1905] 1 Ch. 744).

*Division and
extinction of
charge*

1218. A rent charge is divisible ;^(a) but the purchase by the owner of the rent charge of part of the land subject to the charge will extinguish the charge entirely.^(b)

(a) Co. Litt. 148 a.

(b) Litt. s. 222.

Dennett v. Pass (1834), 1 Bing. (N.C.) 388. (But see *Knight v. Calthorpe* (1685), 1 Vern. 347.)

The rule is otherwise when the part of the land comes to the owner of the rent charge by operation of law (Litt. s. 224). *Quære* : whether the personal remedy is gone (Co. Litt. 150 a). A rent charge is apportionable day by day in respect of time ; but the person liable to pay it is not bound to pay any apportioned part until the ordinary day for payment arrives (Apportionment Act, 1870, ss. 2-13).

1219. Any quit rent, chief rent, or other annual *Redemption of charge* or periodical sum issuing out of land (including a rent reserved on a sale, or made payable under a grant or licence for building purposes, and a compensation rent charge created as the consideration for the extinguishment of manorial incidents) may be redeemed by the owner of the land subject thereto ^(a) on payment of a sum certified by the Minister of Agriculture under the Rules issued by him for the purpose.^(b) This paragraph does not apply to tithe rent charge or other payment redeemable under the Tithe Acts, 1836-1918, nor to rents reserved by a lease or tenancy or an agreement therefor ;^(c) nor does it apply to an annuity charged on land in lieu of the rent charge by virtue of the Tithe Act, 1936.^(d)

(a) L.P.A., 1925, s. 191 (1).

(b) *Ibid.* s. 191 (9). (These Rules will be found set out in Vol. II of Wolstenholme's and Cherry's *Conveyancing Statutes* (12th ed.), pp. 794-803.)

(c) *Ibid.* s. 191 (12).

(d) Tithe Act, 1936, s. 13 (9).

A "quit rent" represents a *modus* or composition for miscellaneous personal services anciently due from the tenants of a manor to the lord (*adueratio*). A "chief rent" represents a survival from the days before the Statute *Quia Emptores* of 1290, when it was possible for a subject to create a fee simple *de novo* and reserve a tenurial rent out of it.

1220. A rent charge or annual sum of money *Rent charge charged on another rent charge* (not being a rent service) may be granted, reserved or created out of or charged on another rent charge in the same manner as it could have been charged on land.^(a)

(a) L.P.A., 1925, s. 122.

There could be no rent charge on a rent charge at common law (Co. Litt 47 a). Instead of the statutory remedies of distress, entry into possession and demise to trustees, the owner of a rent charge charged upon another rent charge may appoint a receiver if the rent or any part thereof is in arrear for twenty-one days. The receiver has all the powers of a receiver appointed by a mortgagee (L.P.A., 1925, s. 122).

TITLE VII—CUSTOMARY RIGHTS OVER LAND

1221. A right in the nature of an easement over land may be claimed on the ground of immemorial custom by a person on behalf of himself and other members of a limited but indeterminate class, defined by reference to locality, independently of the occupation or ownership of any dominant tenement.^(a) A right in the nature of a profit *à prendre* (other than a mining right^(b) or a right under a manorial custom)^(c) cannot be so claimed;^(d) at any rate except upon payment of a reasonable fee.^(e) A customary right over land will be construed strictly.^(f)

(a) *Abbot v. Weekly* (1665), 1 Lev. 176.

Fitch v. Rawling (1795), 2 Hy. Bl. 393.

Tyson v. Smith (1838), 9 Ad. & El. 406. (Here the restriction of locality was very vague.)

Mounsey v. Ismay (1863), 1 H. & C. 729.

Bourke v. Davis (1889), 44 Ch. D. at p. 120, *per* KAY, J.

Mercer v. Denne, [1904] 2 Ch. 534.

Edwards v. Jenkins, [1896] 1 Ch. 308, in which KEENEWICH, J., decided that a customary right of user of land could not be claimed on behalf of the inhabitants of three adjacent parishes, is probably wrong (*Brocklebank v. Thompson*, [1903] 2 Ch. at p. 353, *per* JOYCE, J.).

(b) *Rogers v. Brenton* (1847), 10 Q.B. 26.

Ivimey v. Stocker (1866), 1 Ch. App. at p. 403, *per* Lord CRANWORTH, L.C. ("any persons").

(c) Copyhold customs were really only a method of dividing the ownership of the soil between the lord and his tenants. They bore little analogy to the so-called "freehold customs" treated in this Title.

(d) *Gateward's Case* (1607), 6 Co. Rep. 59 b.

Grimstead v. Marlowe (1792), 4 Term Rep. 717.

Lloyd v. Jones (1848), 6 C.B. 81.

Bland v. Lipscombe (1854), 4 E. & B. 713, n.

Allgood v. Gibson (1876), 34 L.T. 883.

Fitzhardinge (Lord) v. Purcell, [1908] 2 Ch. at p. 163, *per* PARKER, J.

(e) *Mills v. Colchester Corpn.* (1867), L.R. 2 C.P. at p. 484, *per* Curiam.

(f) *Rogers v. Brenton*, *ubi supra*, at p. 57, *per* Curiam.

Customary rights of user stand midway between true easements (*ante*, §§ 1167–1182) and public rights in respect of land, which are not the subject of this work. They differ from the former, in that

they are not claimed in respect of a dominant tenement (which ever true easement is), and are, probably, inalienable and inextinguishable except by statute. They differ from public rights, because they are restricted to a definite local class, and can be directly enforced by individuals, without the co-operation of the Crown or the Attorney-General. Courts of First Instance have held that customary rights are not within the Prescription Act, 1832; notwithstanding the express words of s. 2 of that Act (*Mounsey v. Ismay* (1865), 3 H. & C 486). But this view has been questioned in the Court of Appeal by Cozens-Hardy, L.J., (*Mercer v. Denne*, [1904] 2 Ch., at p. 586). There would appear to be no doubt that customary rights over land are included in the definition of legal interests contained in the L.P.A. 1925, s. 1 (2) (a), though, in a sense, they are, being claimable by individuals, necessarily only life interests.

*Must be
reasonable*

1222. Such a claim must be reasonable in its character and extent—i.e. it must not tend to the destruction of the servient tenement or of the owner's beneficial enjoyment thereof.

Millechamp v. Johnson (1746), Willes, 205, n.

Taylor v. Devay (1837), 7 Ad. & El. 409.

Tyson v. Smith (1838), 9 Ad. & El. at pp. 421-2, *per Curiam*.

Sowerby v. Coleman (1867), L.R. 2 Exch. 96.

Hall v. Nottingham (1875), 1 Ex. D., at p. 4, *per* CLEASBY, B.

Wolstanton, Ltd. and A.-G. of Duchy of Lancaster v. Newcastle-under-Lyme Borough Council, [1940] A.C. 860.

It is on this ground that it has been held, that a claim by custom to a right in the nature of a profit *à prendre* is bad (*Sowerby v. Coleman* *ubi supra*, at p. 98). For examples of customary rights which have been regarded as reasonable, see Addendum to this Title.

*No abandon-
ment*

1223. Customary rights once proved to exist can only be abolished by Act of Parliament; but long continued non-user may be evidence against the alleged existence of such rights.

Hammerton v. Honey (1876), 24 W.R. at p. 604, *per* JESSEL, M.R.

Scales v. Key (1840), 11 Ad. & El. 819, sometimes quoted as inconsistent with the latter part of this paragraph, was not a case of custom affecting rights over land.

ADDENDUM TO TITLE VII

The following customary rights of user of land have been supported by the Courts:

1. A right to draw water from a spring for domestic purposes.
(Such a right is not a profit *à prendre*.)

Race v. Ward (1855), 4 E. & B. 702.

2. A right of way.

Foxall v. Venables (1590), Cro. Eliz. 180.

Brooklebank v. Thompson, [1903] 2 Ch. 344.

3. A right to play games and indulge in pastimes to a reasonable extent.

Abbot v. Weekly (1665), 1 Lev. 176 (dances).

Fitch v. Rawling (1795), 2 Hy. Bl. 393 (cricket).

Mounsey v. Ismay (1863), 1 H. & C. 729 (horse races).

Hall v. Nottingham (1875), 1 Ex. D. 1 (dances).

4. A right to take walking (? riding) exercise.

Abercromby v. Fermoy Town Commrs., [1900] 1 I. R. 302.

A *jur spatiaudi* cannot be acquired as a true easement (*A.-G. v. Antrobus*, [1905] 2 Ch. at p. 198, *per* FARWELL, J.).

5. A right to deposit oysters or nets on the foreshore.

Truro Corp. v. Rowe, [1901] 2 K.B. 870 (oysters).

Mercer v. Denne, [1904] 2 Ch. 538 (nets).

6. A right to erect booths during a fair.

Tyson v. Smith (1838), 9 Ad. & El. 406.

It may be doubted whether this right would, at the present day, be recognized to the extent allowed in *Tyson v. Smith*. But it would probably be recognized in favour of a strictly limited class.

7. A right to perambulate parish boundaries.

Goodday v. Michell (1595), Cro. Eliz. 441.

Taylor v. Devey (1837), 7 Ad. & El. 409.

The customs by which the owner of a mill can compel the inhabitants of the manor to bring their corn to be ground (*Cort v. Birkbeck* (1779), 1 Doug. (K.B.) 218; *Richardson v. Walker* (1824), 2 B. & C. 827), known in Scotland as "thirlage", and by which the inhabitants of a parish can compel the owner of the great tithes to keep a bull or boar for the use of the parish (*Lanchbury v. Bode*, [1898] 2 Ch. 120), cannot be properly classed as giving rise to customary rights of user of land, though they have a local operation.

NOTE ON PUBLIC RIGHTS OF WAY.

A public right of way, or highway, is not an easement. It may be acquired, (1) by statute, (2) by dedication express or implied by a person legally competent to dedicate, followed by acceptance by the public, such acceptance being usually shewn by user by the public. Formal dedication is rare. Dedication is usually inferred from long user by

the public, which must have been open user as of right and without interruption for so long a period as to justify the inference that the landowner consented to the user. User with the consent or licence of the landowner is not user as of right. The length of the period of enjoyment to be shewn depends on the circumstances of each case. The normal practice to disprove an intention to dedicate is to close the way for one day each year. Such is the position at common law which has not been abrogated by the Rights of Way Act, 1932. This Act provides that when a way over land has been actually enjoyed by the public as of right without interruption for twenty years, it will be deemed to have been dedicated as a highway unless the landowner can shew that during that period there was no intention to dedicate such way, or unless there was not at any time during that period any person in possession of such land capable of dedicating such a way (generally, apart from statutory provisions only the owner of a fee simple can dedicate a way). Where any such way has been enjoyed as aforesaid for forty years, it shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate during the period. Here, the claim cannot be defeated by shewing that there has not been at any time during the forty years any person in possession capable of dedicating, e.g. that the land has been continuously held under a lease. The absence of any intention to dedicate can be shewn in one of the usual ways, such as by closing the way for one day in each year, or by one of the methods provided by the Act, such as, placing and maintaining a notice visible to those using the way, and if the notice is subsequently defaced or torn down, by giving written notice to the county council and the borough or urban or rural district council. Also by depositing with the above councils a map with a statement of what ways the landowner admits to be highways and lodging statutory declarations at intervals of not more than six years stating whether any other ways have been dedicated. The twenty and forty years periods are those next before the time when the right to use the way was brought into question by a notice exhibited to the public negating dedication or otherwise. A reversioner or remainderman upon a life interest has the same remedies against the public as if he were in possession.

TITLE VIII—EQUITABLE INTERESTS, I.E. INTERESTS IN LAND OTHER THAN LEGAL INTERESTS

1224. All interests in land other than legal *Equitable interests* interests are equitable interests. The chief classes of equitable interests in land are (a) entailed interests, (b) life interests, (c) such determinable interests as are incapable of existing as legal interests, (d) future interests (reversions and remainders), (e) purely equitable interests.

L.P.A., 1925, ss. 1 (3) 4.

This provision of the L.P.A., 1925, has unquestionably greatly expanded the scope of equitable interests. Prior to 1926, the latter included only such interests as had grown up under the fostering care of the old Court of Chancery ; though they had, of course, been protected, since 1875, by all branches of the High Court. Such were (i) the interests of the beneficiaries under a trust, (ii) the interest of a mortgagor who (or whose predecessors in title) had conveyed the legal estate to a mortgagee, (iii) the interest of the purchaser of land who had given valuable consideration but not obtained an effectual conveyance. (iv) Restrictive covenants under the doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774. Generally speaking, the new classes of equitable interests created by the L.P.A., 1925, s. 1 (3) are, no doubt, protected by remedies somewhat similar to those open to the owners of the interests above enumerated, which are, of course, not abolished ; but it is impossible to regard them as standing on the same footing. They may, perhaps, be described as “ statutory equitable interests ”. For the older class of equitable interests some distinctive title seems therefore also to be required ; and it is suggested that “ purely equitable interests ” would be convenient.

1225. Generally speaking, equitable interests in *General principle* land are enforceable only against the owner of the corresponding legal estate in the land ;^(a) and purchasers of the legal estate from him who have notice either actual or constructive at the time of the completion of the purchase. Registration of any matter which is registrable under the Land Charges constitutes

actual notice.^(b) Equitable interests are not enforceable against a purchaser of the legal estate, even if he has notice of them before completion of his purchase, when they are void against him for want of registration,^(c) or when the estate owner conveying had power to overreach them,^(d) or was a person who was not bound by the equitable interest because he was a purchaser without notice.^(e)

- (a) L.P.A., 1925, s. 3. Equitable interests are enforceable against the owner of the legal estate not being a purchaser taking free from them. In brief the section makes the legal owner, e.g. a tenant for life or trustees for sale, a trustee for everyone of whose interest he knows, without prejudice to his power of dealing with the land.
- (b) *Ibid.* s. 198.
- (c) *Ibid.* s. 199.
- (d) *Ibid.* ss. 2, 27, 28, 50, 104, 204; S.L.A., 1925, ss. 21, 72; A.E.A., 1925, s. 39.
- (e) *Wilkes v. Spooner*, [1911] 2 K.B. 473.

Overreaching means that an equitable interest is shifted from the land and made to attach to the proceeds of sale; the equitable owner ceases to enjoy the land, but has a corresponding interest in the purchase money. The interest is not defeated or overridden, nor is the beneficiary defrauded. Today the rights of the beneficiaries under a settlement or a trust for sale are equitable. Where land is settled on A for life and then to B for life, the first tenant for life, A, has the general control of the property. As will be seen later, A may sell the whole legal fee simple, and provided the purchase money is paid to the trustees of the settlement, who must be at least two in number or a trust corporation, the purchaser takes the land free from their equitable life interests which will then attach to the purchase money. Again, if land is vested in trustees holding it on trust for sale and to pay the income to A for life and then to B for life. Here the trustees control the land, and provided a purchaser pays the price to the two trustees, he acquires the land free from the interests of A and B which now attach to the purchase money. Where A has a legal estate in fee simple subject to a rent charge thereon in favour of B for life, not being within the S.L.A., 1925, s. 1 (1) (v), B may register his equitable charge under the Land Charges Act, 1925, s. 10 (1) C (iii), and this would be notice to the purchaser. But under the L.P.A., 1925, s. 2 (2), A may convey the legal estate to two trustees, who are approved or appointed by the Court, or to a trust corporation on trust for sale, who may sell the legal fee simple to a purchaser; and provided he pays the price to the trustees or the corporation, he acquires the land free from B's equitable charge, but the charge will attach to the proceeds of sale. Thus an equitable interest prior to the trust for sale

is overreached. This is sometimes known as a special trust for sale. Under an ordinary trust for sale only the equitable interests which came into being under the trust are overreached. But the following equitable interests cannot be overreached under L.P.A., 1925, s. 2 (2) : (i) equitable interests protected by title deeds ; (ii) the benefit of a restrictive covenant affecting the use of land (when registered), (iii) equitable easements (when registered), (iv) an estate contract (when registered), (v) any equitable interest protected by registration under the Land Charges Act, 1925, other than, (i) an annuity within the meaning of Part II of that Act, (ii) a limited owner's charge or a general equitable charge within the meaning of that Act. Provisions similar to the L.P.A., 1925, s. 2 (2) are contained in the S.L.A., 1925, s. 21. The provisions are somewhat technical, and in practice use is only made of those sections where the equitable owner is difficult to trace. To sum up, a tenant for life under a settlement can overreach the equitable interests arising under the settlement provided the purchase money is paid to at least two trustees of the settlement (S.L.A., 1925, s. 72); trustees holding land on trust for sale can overreach the equitable interests of the beneficiaries thereunder provided the purchase money is paid to at least two of the trustees (L.P.A., 1925, ss. 27, 28). A mortgagee under his power of sale may overreach the equitable right of the mortgagor to redeem the land (L.P.A., 1925, s. 104). A sale under an order of the Court has the overreaching effect mentioned in the L.P.A., 1925, ss. 2 (i)(iv), 204, and a sale by personal representatives has the overreaching effect set out in the A.E.A., 1925, s. 39.

1226. As between persons claiming equitable interests in land and the owners of the legal estate, no liability in respect of the equitable interest falls on the latter until they have received notice, express (in writing), implied, or constructive (§§ 1291-1339 *post*), of such equitable interest. As between rival equitable claimants against the same estate owner, the equitable claimants will rank in the order in which their written notices reached, or are deemed to have reached, the estate owner or owners,^(a) or, if their interests are required or authorized to be registered under the Land Charges Act, 1925, s. 10, then, in accordance with § 1369 *post*.^(b)

*Notice
necessary*

(a) L.P.A., 1925, s. 137 (1) (3). (A priority acquired before 1926 is not affected by this provision (*ibid.* (7)).)

(b) Land Charges Act, 1925, s. 13.
L.P.A., 1925, s. 198.

S.137 L.P.A., 1925, which extends to equitable interests in land, the rule laid down in *Dearle v. Hall* (1828), 3 Russ. 1, as applicable to choses in action and equitable interests in pure personalty, is one of the worst examples of the disastrous practice of "legislation by reference". For it is by reference, not to another and definite enactment, but to a somewhat vague judicial doctrine, as to the precise extent and application of which there are some doubts (§ 1802 *post*). A golden opportunity was thus lost of clearing up these doubts and stating the Rule in *Dearle v. Hall* with finality. Where there are no persons to whom effective notice can be given, the purchaser of an equitable interest may require that a memorandum of the transaction be endorsed, written on or permanently annexed to the instrument creating the trust (L.P.A., 1925, s. 137 (4)); and a trust corporation may be nominated in any settlement to whom notices affecting dealings in the trust property may be given (L.P.A., 1925, s. 138). See § 1369 n, *post*.

*Heir taking
by purchase*

1227. A limitation of real or personal property in favour of the heir, either general or special, of a deceased person, as purchaser, will, if created by an instrument coming into operation after 1925, confer a corresponding equitable interest upon the person who, according to the law as it stood immediately before 1926,^(a) would have answered the description of the heir at the death of such deceased person, or at the time named in the limitation, as the case may require.^(b)

(a) This means the common law of inheritance as amended by the Inheritance Act, 1833, and the L.P.Am.A., 1859, s. 19 (which is not repealed by the L.P.A., 1925).

(b) L.P.A., 1925, s. 132.

Inheritance according to the prior law having been substantially abolished by the A.E.A., 1925, s. 46, it was necessary to make this special provision for the case of the heir taking by purchase. Special modes of inheritance (e.g. by gavelkind custom) were abolished by the same Act (s. 45 (a)). It is not considered necessary, therefore, to set out the whole law of inheritance in this edition, as the cases involving it are believed to be few. But it will be found set out in the 2nd (1921) edition, in §§ 2051-2058, and, to a limited extent (*post*, §§ 2058-2061), in the present edition.

STATUTORY EQUITABLE INTERESTS IN LAND

(1) ENTAILED INTERESTS

228. An entailed interest is an interest which is *Entailed interests* endible on the death of its owner to all the lineal issue of the original donee, or of a person who was his ancestor,^(a) in due order of inheritance ("interest in tail general"), or, in due order, to all the issue of such person by a particular husband or wife, or by a husband or wife of a specified class or description ("interest in tail special"), or to and through the male or female lineal issue of such person or persons ("interest in tail male" (or "female") general" (or "special")).^(b) An entailed interest may be created by way of trust in any property, real or personal.^(c)

) *Page v. Hayward* (1705), 2 Salk. 570. (An entail may be created by a limitation to the heirs of the body of a deceased person, the first of such heirs who becomes entitled taking by purchase.)

Re Mounigarret, Mounigarret v. Ingilby, [1919] 2 Ch. 294. (Also by a limitation to an only son and the heirs of the body of his father who is then dead, the son taking an entailed interest which on his death without issue will go to the next heir of the body of the father. Litt. sec. 30.)

) 13 Edw. I (1285) c. 1 (*De Donis Conditionalibus*). Co. Litt. 91 *et seq.*

) L.P.A., 1925, s. 130 (1).

In the case of a gift to the heirs of the body of a named person, if such person takes no interest, the estate will be inheritable by the issue, answering the description, of the named person, not only by the issue of the first taker (Inheritance Act, 1833, s. 4, as amended by the A.E.A., 1925, s. 45 (2), and the L.P.A., s. 176 (1)). Subject to certain exceptions, the most important of which is, perhaps, that an entailed interest can now be created in "any property, real or personal", the L.P.A., takes over the old law of entailed estates created by deed (s. 130 (4)); but, of course, invests the new entailed estates only with equitable qualities and makes them devisable (s. 176).

1229. An interest in tail general is created by a *General and special* limitation, in an assurance by deed, to the donee

"and the heirs of his body",^(a) or, in the case of deeds executed after 1881, to the donee "in tail".^(b) An interest in tail special is created in an assurance by deed by a limitation to the donee "and the heirs of his (her) body by his (her) wife (husband)" (*naming or describing such wife or husband*).^(c) An interest in tail male (or female) is created by a limitation in a deed to the donee "and the heirs male (or female) of his body";^(d) or, in the case of deeds executed after 1881, the donee "in tail male" (or "female").^(e) In a testament coming into operation before 1926 any of such kinds of entailed interest may be created by a devise in any words from which the testator's intention to create such kind of interest can be gathered;^(f) but in a devise coming into operation after 1925, only the technical words required to create an entailed interest in a deed will be sufficient to have the same effect in a testament.^(g)

(a) In Littleton's day it was necessary to add the word "begotten", or some equivalent; but by Coke's time, the word had become unnecessary (Co. Litt. 20 b). There seems to have been a good deal of uncertainty at one time about the orthodox "words of procreation". (See Butler's & Hargreaves notes to same passage.)

(b) L.P.A., 1925, s. 60 (4).

(c) Co. Litt. 20 b.

(d) *Ibid.* 24 a.

(e) L.P.A., 1925, s. 60 (4) (b) (c). (There appears to be no statutory form of creating an entail special.)

(f) *Ossulston's (Lord) Case* (1708), 3 Salk. 336 ("heirs males").

Fernon v. Wright (1858), 7 H.L.Cas. 35.

Mannox v. Greener (1872), L.R. 14 Eq. 456.

Pelham-Clinton v. Newcastle (Duke), [1902] 1 Ch. 34.

(g) L.P.A., 1925, s. 130 (2). (The words "fee simple or other interests" are misleading.)

A grant to a corporation sole and the heirs of its body would probably be held evidence of an intention to grant an entailed interest to the donee in his individual capacity. On the penultimate clause of the text, it must be carefully remembered that, by the well-known resolution in *Wild's Case* (1599), 6 Co. Rep. 16 b, a devise to a man and his "children" or "issue" did not confer on the first taker an entailed interest if either (a) there was evidence in the will that the

testator intended the children or issue to take by way of remainder or executory limitation (*Re Jones, Lewis v. Lewis*, [1910] 1 Ch. 167), or the devise is capable, by reason of the fact that children or issue of a first taker were living at the date of the devise, of being held to as a joint estate (*Byng v. Byng* (1862), 10 H.L.Cas. 171). Under the law, the joint devisees in this case usually took only life estates. Now, under s. 28 of the Wills Act, 1837, they will, usually, take the sole interest of the testator (L.P.A., 1925, s. 130 (2)). As to the effect of a conveyance or devise to-day containing informal expressions such as, "to A and his issue, etc.," see *Bailey, Cambridge Law Journal*, vol. VI, pp. 67-82; *Megarry, op. cit.*, vol. IX, pp. 46-55; *Bailey & Morris, ibid. pp.* 185-191.

1230. The tenant in tail in possession has the same rights to possession and user of the land as the tenant in fee simple (*ante*, § 1047);^(a) except that a tenant in tail special whose spouse is dead leaving no surviving issue inheritable under the entail ("tenant-in-tail after possibility of issue extinct") may be re-
Rights of
tenant in
tail
 tained from committing equitable waste.^(b)

(a) Co. Litt. 224 a.

Portington's Case (1613), 10 Co. Rep. at 39 a.

Savil v. Savil (1727), 11 Vin. Abr. 154.

(b) *Turner v. Wright* (1860), 2 De G.F. & J. at p. 247, per Lord CAMPBELL, C. Before the Judicature Act, 1873, s. 25 (3), a tenant in tail after possibility could not be sued in tort for waste (*Williams v. Williams* (1810), 12 East, 209. *Quære*: since the Act). Such tenant in tail is also unable to "bar" the entail; notwithstanding the repeal of s. 18 of the Fines and Recoveries Act, 1833, by the L.P.A., 1924 (Expiring Laws Act, 1925, s. 1 (2)).

The conversion by the L.P.A., 1925, s. 1 (3) of entailed estates to equitable interests has thrown grave doubts on the rule stated in this paragraph. A tenant in tail in possession will now usually be (have the powers of) a "tenant for life" under the S.L.A., 1925 20 (1) (1); and the legal estate in the fee simple will be vested in him. If in his capacity of tenant in tail he commits equitable waste for his own private benefit, will he not be violating his fiduciary duties under the Act? See *Potter*, 1938, *Conveyancer*, pp. 233-250.

1231. An entailed interest cannot be transferred by the act of the parties.^(a) But any tenant in tail in possession, and any tenant in tail entitled to the remainder or reversion in fee immediately expectant on his estate tail (not being a tenant in tail after
Barring
entail

possibility of issue extinct,^(b) or a tenant in tail whose interest was originally granted by the Crown for services rendered, and the reversion or remainder whereof is in the Crown)^(c) may convert his interest in tail into a fee simple by any deed showing an intention to that effect.^(d) And a tenant in tail in remainder (not being such tenant as aforesaid), may, with the consent of the protector of the settlement,^(e) so convert his entailed interest into a fee simple or any less estate.^(f) The owner of an entailed interest of full age in possession (including the owner of a base fee (*post*, § 1232) in possession who has power to enlarge it into a fee simple without the consent of any other person (§ 1232) may so convert by any devise contained in his will, executed since 1925; but only if such devise refers specifically either to the property or to the instrument under which it was acquired or to entailed property generally.^(g) Any condition, covenant, proviso, or limitation forbidding such conversion, or providing for the cesser or forfeiture of an estate tail upon such conversion, is void.^(h)

(a) *Stone v. Newman* (1635), Cro. Car. at p. 428, *per Curiam*.

(b) Fines and Recoveries Act, 1833, s. 18. Repealed by L.P.A.M.A., 1924, Sched. X, but revived by the Expiring Laws Act, 1925.

(c) 34 and 35 Hen. VIII (1542), c. 20, ss. 1, 2.

Fines and Recoveries Act, 1833, s. 18.

A.-G. v. Richmond (Duke) (No. 2), [1907] 2 K.B. 940.

(d) Fines and Recoveries Act, 1833, s. 3. (The former necessity for enrolment was abolished by the L.P.A., 1925, s. 133 (1)).

(e) Fines and Recoveries Act, 1833, s. 34. (For definition of "protector" see *post*, §§ 1233-1238.)

(f) *Ibid.* ss. 15 and 21. (The consent may be given by a deed which does not expressly state it; if it is clear that the protector intended the remaindermen to be barred (*Re Wilmer's Trusts, Wingfield v. Moore*, [1910] 2 Ch. 111)).

(g) L.P.A., 1925, s. 176.

An entailed interest not so disposed of ceased to be assets of the testator, and is deemed to be an interest ceasing on his death (A.E.A., 1925, s. 3 (3)). Generally speaking, it follows the common law canons of inheritance, as modified by the Inheritance Act, 1833, and the L.P.A.M.A., 1859.

- h) *Corbet's Case, Corbet v. Corbet* (1600), 1 Co. Rep. 83 b.
Mildmay's Case (1605), 6 Co. Rep. 40 a.
Portington's Case (1613), 10 Co. Rep. 35 b.
Dawkins v. Penrhyn (1878), 4 App. Cas. at p. 64, *per* Lord PENZANCE.

1232. A disentailing assurance executed by a *Base fee* tenant in tail not in possession, and not entitled to the aid or reversion in fee immediately expectant on his entailed interest, without the consent of the settlor of the settlement (if any), limits a base fee in the person in whose favour the assurance is executed.^(a) Such base fee will *ipso facto* terminate on the failure of the issue in tail, unless in the meantime it has been enlarged into a fee simple absolute.^(b)

(a) Fines and Recoveries Act, 1833, ss. 22 and 34.

Seymour's Case (1612), 10 Co. Rep. 95 b.

(b) Fines and Recoveries Act, 1833, s. 19.

The principle of the base fee is, that it lasts so long as the entailed estate of the person creating it would have lasted. Thus, if there is a remainder in remainder to A and the heirs male of his body, and B, who has inherited the interest as A's eldest son, conveys, without the consent of the protector, to C and his heirs, C's interest, unless ended, ceases with the failure of A's issue male through males. A base fee is a fee simple determinable (*Seymour's Case, ubi supra*).

1233. The protector of the settlement, for the purposes of § 1232, means the person or persons named by the settlement to the first subsisting beneficial interest in the land (being an interest for years determinable on the dropping of a life or lives, or any other interest, and not being a lease at a rent),^(a) notwithstanding that any such person or persons has since alienated or encumbered such interest.^(b) *Protector of settlement*

(a) Fines and Recoveries Act, 1833, s. 22, as modified by the L.P.A., 1925, Sched. VII.

(b) Fines and Recoveries Act, 1833, s. 22.

Until 1926, the settlor might appoint "special protectors", not exceeding three in number. But s. 32 of the Fines and Recoveries Act, 1833, was repealed by the L.P.A., 1925, though with a saving for protectors appointed under settlements coming into operation before 1926.

*Interests not
conferring
protectorship*

1234. No bare trustee, heir, executor, administrator, or assign becomes protector of a settlement virtue of any interest taken in such capacity.

Fines and Recoveries Act, 1833, s. 27.

Trustees directed to accumulate rents until a tenant in tail reaches a given age are not "protectors" of such entail; and such tenant in tail can create a fee simple without their consent (*Re Trevanion v. Lennox*, [1910] 2 Ch. 538).

*Supplementary
protectors*

1235. When any person is excluded under § ante, from being protector of the settlement, the owner or owners of the next interest of the kind described in § 1233 will be protector or protectors of the settlement.^(a) If the protector is of unsound mind (whether so found by inquisition or not), the Lord Chancellor or other the person or persons for the time being trusted by the King's sign-manual with the custody of the persons and estates of persons of unsound mind, is protector of the settlement.^(b) If the protector is convicted of treason or felony,^(c) or if it is uncertain whether he is alive or dead, or if the person who would otherwise be entitled by virtue of interest to be protector has been excluded by settlor, but no substitute appointed in his stead, or for any other reason there is no protector existing virtue of such interest, the Chancery Division of High Court of Justice is protector of the settlement.

(a) Fines and Recoveries Act, 1833, s. 28.

(b) *Ibid.* s. 33.

Lunacy Act, 1890, s. 108.

(c) The case of the convict, though stated, is, by a slip of the drafts not provided for by the section (33). The omission must be rectified by implication (*Re Wainwright* (1843), 1 Ph. : But ? since 1870.

(d) Fines and Recoveries Act, 1833, s. 33.

Ibid. ss. 38, 48, 49.

*Discretion of
protector*

1236. The protector of the settlement, in giving or withholding his consent to a disposition by tenant in tail, acts according to his absolute discretion.

and not as a trustee. Any device, shift, or contrivance, by which it is attempted to control the free exercise of the protector's discretion, whether imposed by the settlor or entered into by the protector himself, is void.

Fines and Recoveries Act, 1833, ss. 36, 37.

1237. Where two or more persons are the protectors of the settlement, by virtue of the ownership of undivided shares in an interest of the kind described in § 1233, each of them is sole protector in respect of such undivided share as he could dispose of.^(a) Where two or more persons have been appointed by the settlor as protectors, the consent of the survivor or survivors will be sufficient to enable the tenant in tail in remainder to bar the entail; in so far as no substitute for a deceased protector has been appointed.^(b) *Joint protectors*

(a) Fines and Recoveries Act, 1833, s. 23.

An undivided share in land can now only take effect behind a trust for sale (S.L.A., 1925, s. 36 (4)). Hence the undivided share will be personal estate, which can now be the subject of an entail (L.P.A., 1925, s. 130).

Law of Property (Entailed Interests) Act, 1932, s. 1.

(b) *Cohen v. Bayley-Worthington*, [1908] A.C. 97.

This decision can now, of course, apply only to settlements coming into operation before 1926.

1238. The consent of the protector of the settlement must be given (if at all) either by the same assurance by which the disposition by the tenant in tail is effected, or by a separate deed executed on or before the day on which such disposition is made.^(a) No consent given by a protector can be revoked.^(b) *Mode of consent*

(a) Fines and Recoveries Act, 1833, ss. 42, 46.

Whitmore-Searle v. Whitmore-Searle, [1907] 2 Ch. 332.

(b) Fines and Recoveries Act, 1833, s. 44.

Inasmuch as the protector's consent must be given either by a deed executed before or on the same day as the disposition by the tenant in tail, or by joining in such disposition itself, it follows that, if it was not given before the tenant in tail's death, it can only be given by executing such disposition (*Whitmore-Searle v. Whitmore-Searle*,

ubi supra). It may be effectually given by a deed which does not, in form, profess to give it ; if it is clear from the deed that the protector intended the remaindermen to be barred (*Re Wilmer's Trusts, Wingfield v. Moore*, [1910] 2 Ch. 111).

*Enlargement
of base fee*

1239. A base fee (§ 1232) is enlarged into a fee simple by any of the following events, viz. :—

- (i) the vesting of the immediate remainder or reversion in fee (simple) in the same land, in the person in whom such base fee is vested ;

Fines and Recoveries Act, 1833, s. 39.

- (ii) the execution by the person who, but for the creation of such base fee, would have been tenant in tail of the land, of a disposition, in favour of the person in whom such base fee is vested, which disposition would, but for the existence of such base fee, have passed a fee simple in such land ;

Fines and Recoveries Act, 1833, s. 19.

Such a disposition will, of course, require the consent of the protector, if any (*ibid.* s. 35). But if, after an assurance of a base fee by a trustee in bankruptcy, there ceases to be a protector of the settlement, the base fee automatically enlarges into a fee simple absolute (*ibid.* s. 60).

- (iii) the continuance in possession of the person in whose favour such base fee was created, or any person whosoever except a person claiming in remainder on or defeasance of the entailed interest, for twelve years next after the creator of such base fee might have barred the entail without the consent of any other person ;

Limitation Act, 1939, s. 11.

- (iv) by a gift by will complying with s. 176 of the Law of Property Act, 1925.

*covenant
to settle*

1240. A covenant to settle after-acquired property does not bind the covenantor to execute a

disentailing assurance of an interest in tail which subsequently becomes vested in him, or to grant a life interest out of it.

Re Dunsany's Settlement, *Nott v. Dunsany*, [1906] 1 Ch. 578 (approving *Hilbers v. Parkinson* (1883), 25 Ch. D. 200).

1241. Neither an interest in tail,^(a) nor a base fee,^(b) will merge in any subsequent interest. *No merger*

(a) *Stafford's (Lord) Case* (1609), 8 Co. Rep. at p. 75 a.

Re Dunsany's Settlement, *Nott v. Dunsany*, *ubi supra* at p. 582, *per* ROMER, L.J.

(b) Fines and Recoveries Act, 1833, s. 39. (A base fee does not merge; it enlarges.)

1242. An assurance by deed by a tenant in tail made otherwise than in conformity with the Fines and Recoveries Act, 1833, as amended by the Law of Property Act, 1925, confers upon the transferee only a descendible fee, determinable, on the death of the assurator, by entry by the heir in tail, or such less interest as is expressed by the assurance to be created or transferred.^(a) No contract by a tenant in tail to execute a disentailing assurance will be specifically enforced against the issue in tail or the remainderman;^(b) except a contract in which a tenant in tail in possession has power to vest (or procure to be vested) in himself or the purchaser the fee simple or a term of years absolute in the land.^(c) *Imperfect alienation*

(a) *Stone v. Newman* (1635), Cro. Car. 427.

Machil v. Clerk (1702), 2 Salk. 619 (overruling *Took v. Glascock* (1669), 1 Wms. Saund. 250).

Mills v. Capel (1875), L.R. 20 Eq. 692.

Hankey v. Martin (1883), 49 L.T. 560 (where the interest is described, by KAR, J., as a "base fee").

Quære: whether the heir's right is a right of entry or a right of action (*Doe d. Neville v. Rivers* (1797), 7 Term Rep. 276; *Doe d. Gregory v. Whichelo* (1799), 8 Term Rep. 211).

(b) Fines and Recoveries Act, 1833, s. 47. This section does not prevent the contract being enforced against the tenant in tail himself during his lifetime (*Bankes v. Small* (1887), 36 Ch. D. 716).

(c) L.P.A., 1925, s. 42 (4) (iii). Presumably subject to a contrary intention appearing in the contract.

Confirmation

1243. When a tenant in tail has created, in favour of a purchaser for valuable consideration, a voidable interest, and has afterwards made an assurance under the Fines and Recoveries Act, 1833, of any interest in the same land, such subsequent assurance, whatever its object, will, except as against a purchaser for valuable consideration without express notice of the voidable interest, have the effect of confirming such voidable interest, to the extent to which the tenant in tail could have confirmed it by disposition under the Fines and Recoveries Act.

Fines and Recoveries Act, 1833, s. 38.

Crocker v. Waine (1864), 5 B. & S. 697.

Hankey v. Martin (1883), 49 L.T. 560.

By a "voidable estate" the Act presumably means an interest defeasible by the issue in tail or the remainderman or reversioner. Inasmuch as no assurance under the Fines and Recoveries Act now requires enrolment (L.P.A., 1925, s. 133 (1)), presumably any lease, however short, will have the effect described.

*Incum-
brances
do not bind
issue*

1244. Subject to §§ 1231, 1242, 1243 *ante*, and § 1982 *post*, and to any statutory provision, no encumbrance or alienation created or effected by a tenant in tail binds the issue in tail; and, after the tenant in tail's death, the land is not liable for his debts (including Crown debts).

Statute of Westminster II (1285) c. 1.

L.P.A., 1925, s. 208 (3).

This paragraph must, of course, be read as subject to s. 176 of the L.P.A., 1925, which enables a tenant in tail of full age to dispose of his entailed interest by testament (*post*, § 1982).

(2) LIFE INTERESTS

Life interest

1245. A life interest is an interest tenable during the life of the tenant or of some person or persons (*cestuis que vie*) other than the tenant. In the latter case it is called an interest *pur autre vie*.^(a) A life interest can only exist as an equitable interest.^(b)

(a) Co. Litt. 41 b.

(b) L.P.A., 1925, ss. 1 (8), 4.

1246. An interest for the life of the tenant is *Creation* limited by any express words which shew an intention to do so. An interest *pur autre vie* is created by a limitation to the tenant during the life of another person or persons,^(a) or by a limitation made by a tenant for life of any interest other than a term of years.^(b)

Before 1926 a life estate in a deed was created by words showing an intention to do so, e.g. to A for life, or by using expressions which were insufficient to create an estate of inheritance, e.g. to A for ever (Co. Litt. 42 a).

Wright d. Allingham v. Dowley (1778), 2 Wm. Bl. 1185.

Kusel v. Watson (1879), 11 Ch. D. 129.

Zimble v. Abrahams, [1903] 1 K.B. 577.

In a conveyance *inter vivos* made since 1925, a limitation to A will, in the absence of intention to the contrary, convey a fee simple (or the whole interest the grantor has power to convey) (§ 1043 ante) and a similar construction has been put upon devises since 1837 (§ 1043 ante). Practically, therefore, if it is the intention of the parties that only a life interest should be limited, some such words as "for his life", or "so long as he shall live" should be used.

(a) *Brudnel's Case* (1592), 5 Co. Rep. 9a.

(b) *Boddington v. Robinson* (1875), L.R. 10 Exch. 270.

Brudnel's Case (*ubi supra*) is an authority for saying that a lease to A during the lives of B and C will continue until the death of the survivor of B and C (*Day v. Day* (1854), Kay, at p. 709). (Note the effect of L.P.A., 1925, s. 149 (6) where the lease for life is at a rent.)

Prior to 1926 an interest *pur autre vie* could be created by a limitation without words of inheritance to a person in trust for another person for any interest less than a fee simple other than a term of years. (*Meredith v. Joans* (1631), Cro. Car. 244. *Re Hunter and Hewlett's Contract*, [1907] 1 Ch. 46).

Various anomalous forms of interests for life may be imagined, e.g. an interest to A during the lives of A, B, and C and the survivor (Co. Litt. 41 b), an interest to A for life if B shall so long live, etc. But these are of small practical importance.

1247. A corporation may (subject to the Mort- *Life interest*
main and Charitable Uses Acts) hold an interest *pur* *in corporation*

autre vie ; but not an interest for its own life. *Seemle*, a corporation cannot be a *cestui que vie*.

Bacon, *Abridgement*, 7th Ed., Tit. Corporation E, 263, quoting Y.B. 21 Edw. IV (1482), Hil. pl. 9.

*Rights of
tenant for
life*

1248. Save for the law relating to trusts and mortgages, the tenant for life in possession (not being a mortgagee) is entitled, subject to any disposition made by himself or his predecessors in title, and to any liabilities by covenant or agreement entered into by himself or his predecessors in title, and binding on him at law or in equity (*post*, Section IV, Title II), and to any franchises, easements, or profits (Title VI *ante*) affecting the land, to possession of the land ^(a) and the title deeds thereof,^(b) and to the enjoyment of the rents of the land,^(c) and (subject to § 1251) to the produce and other profits of the soil.^(d)

(a) *Tewart v. Lawson* (1874), L.R. 18 Eq. 490. Prior to 1926, a legal tenant for life was entitled as of course to possession ; the equitable tenant for life was not entitled as of right to possession ; it was a matter for the discretion of the Court (*Re Wyshes, West v. Wyshes*, [1893] 2 Ch. 369; *Re Stamford and Warrington (Earl), Payne v. Grey*, [1925] Ch. 162). Since 1925 a tenant for life is, subject to exceptional cases, entitled to possession of the settled land as estate owner (S.L.A., 1925, s. 19). But as he is a trustee of the settled land for all persons interested (*ibid.* s. 16 (1)), and probably as his right to possession is subject to his obligation to give effect to any legal or equitable interest having priority to his own beneficial interest, it will be controlled by the Court accordingly.

(b) *Garner v. Hannington* (1856), 22 Beav. 627.
Allwood v. Heywood (1863), 1 H. & C. 745.
Leathes v. Leathes (1877), 5 Ch. D. 221.

The tenant for life, being the person in whom the legal estate is vested, is entitled to the custody of the title deeds as of right (S.L.A., 1925, s. 98 (3)) and can recover possession of them from a contingent remainderman. Title deeds do not include deeds of appointment of trustees (*Clayton v. Clayton*, [1930] 2 Ch. 12) or securities for capital money. (S.L.A., s. 98 (3)). If there are special circumstances, e.g. if the tenant for life is not a safe custodian, or the deeds are required to enable the Court to administer the property, the Court may deprive the tenant for life of the title deeds (*Leathes v. Leathes, ubi supra*) and also under S.L.A., 1925, s. 24 (1).

(c) *Re Kemeys-Tynie, Kemeys-Tynie v. Kemeys-Tynie*, [1892] 2 Ch. 211.

(d) *Viner v. Vaughan* (1840), 2 Beav. at p. 469, *per* Lord LANGDALE, M.R.

Honywood v. Honwood (1874), L.R. 18 Eq. at p. 311, *per* JESSEL, M.R.

Brigstocke v. Brigstocke (1878), 8 Ch. D. 357.

1249. A tenant for life is entitled, notwithstanding *Estovers* the provisions of the law against waste, to cut and take from the land sufficient timber for the reasonable repair and fuel of his house standing thereon ("house-bote"), for making and repairing instruments of husbandry to be used thereon ("ploughbote"), and for repairing (ancient) hedges (i.e. fences) thereon ("haybote"); unless he is restrained from so doing by special provision in the instrument creating his interest.

Co. Litt. 41 b.

Estovers may only be used for actual repairs required; timber cannot be cut in advance (*Gorges v. Stanfield* (1597), Cro. Eliz. 593). The incumbent of an ecclesiastical benefice has similar rights (*Strachy v. Francis* (1741), 2 Atk. 217).

1250. A tenant for life whose interest determines *Emblements* (otherwise than by his own act or default) between seed-time and harvest, is entitled, notwithstanding such determination, to free ingress and regress into and from the land, for the purpose of reaping annual crops sown by him in the land ("emblements"). If the tenant for life be dead, his personal representative may exercise such right.

Co. Litt. 55 b.

As a rule, the claim of emblements is confined strictly to *annual* crops (*Graves v. Weld* (1833), 5 B. & Ad. 105). But it is extended to hops, on account of the great labour involved in the cultivation of them (*Latham v. Atwood* (1638), Cro. Car. 515). *Semble*: the right is unaffected by the provisions of the Agricultural Holdings Act, 1923 (s. 24).

1251. A tenant for life, not expressly made un- *Waste by*
impeachable for waste, is liable to an action for *tenant for*
life

damages or an account, and, if necessary, an injunction, if he commits any act of positive ("voluntary") waste (*post*, § 1319) on the land.^(a) Even if he is not impeachable for waste, he will be similarly liable if he is guilty of equitable waste (*post*, § 1320), unless the instrument creating his estate expressly or by implication authorizes him to commit equitable waste.^(b) A tenant for life is not, in the absence of special provision, liable for permissive waste ^(c) (§ 1319).

(a) Co. Litt. 53 a.

Woodhouse v. Walker (1880), 5 Q.B.D. 404.

(b) *Fane v. Barnard* (Lord) (1716), 2 Vern. 738.

L.P.A., 1925, s. 135.

(c) *Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532.

Inasmuch as, under the Settled Land Act, 1925, a tenant for life in possession will frequently have the legal estate in the fee simple vested in him, there may be technical difficulties in bringing an action of Waste against him. *Semble*, he might be made liable for breach of trust if he were guilty of waste. See *Potter*, 1938, *Conveyancer*, pp. 233-250.

*Action for
waste*

1252. The person having the (next) vested interest of inheritance in the land at the time when the waste was committed, and at the time when the action is brought, may bring the action.

Woodhouse v. Walker, ubi supra.

The old Action of Waste was very technical on this point ; but it was practically superseded, long before its formal abolition in 1833 (Real Property Limitation Act, 1833, s. 36), by the Action of Case. The owner of the next vested interest of inheritance may also bring an Action of Trover to recover articles severed from the land, or an action for money had and received from the sale thereof (*Seagram v. Knight* (1867), 2 Ch. App. at p. 632 *per* Ld. Chelmsford, L.C.). There appears to be some authority for saying that the owner of a vested interest for life or years in remainder, or a reversioner for life or years, may also bring an action for damages, (*Greene v. Cole* (1672), 2 Wms. Saund. 252, n.). Any person interested under the settlement may apply for an injunction to prevent the tenant for life from committing waste, and may sue on behalf of himself and all other persons having the same interest (R.S.C. O. XVI r. 37). For the case of collusion between a tenant for life and a remainderman in fee, see *Birch-Wolfe v. Birch* (1870), L.R. 9 Eq. 683, where the Court

interfered, and ordered the value of the timber which was wrongfully cut to be impounded and held for the benefit of the estate and all persons interested in it.

1253. No equitable remedy (e.g. an injunction) will be given against a tenant for life in an action of waste, if the Court is of opinion that the acts of the tenant for life have really improved the value of the inheritance ("ameliorating waste"). *Ameliorating waste*

Mollineux v. Powell (1730), in note to *Bezzick v. Whitfield* (1734), 3 P. Wms. 267.

Doherty v. Allman (1878), 3 App. Cas. 709.

Meux v. Cobley, [1892] 2 Ch. 253.

The last two cases were terms of years; but the argument would be stronger for life tenants. In *Edmund v. Martell* (1907), 24 T.L.R. 25, the Court even refused to give the plaintiff judgment for nominal damages in such a case. But the point was not seriously argued.

1254. Provisions for the cesser or forfeiture of a life interest upon alienation, voluntary or involuntary, may be valid;^(a) provided that they are not aimed at securing objects deemed to be contrary to the policy of the law.^(b) A settlement by a person of his own property upon himself for life, with a provision for cesser or forfeiture on his own bankruptcy, is binding upon the tenant for life, but not upon his trustee in bankruptcy.^(c) *Forfeiture of estate for life*

(a) *Re Bedson's Trusts* (1884), 25 Ch. D. 458 (personalty).

Blackman v. Fysh, [1892] 3 Ch. 209.

Re Cotgrave, Mynors v. Cotgrave, [1903] 2 Ch. 705 (personalty).

(b) For list of such objects see *ante*, § 194.

(c) *Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K.B. 134.

Re Burroughs-Fowler, Burroughs-Fowler's Trustee v. Burroughs-Fowler, [1916] 2 Ch. 251.

1255. Subject to § 1254, the owner of a life interest (including an interest *pur autre vie*) may alienate it,^(a) and, in so doing, may create a quasi fee simple (§ 1256) or a quasi entail (§ 1258). He may also create out of it any estate for years.^(b) *Alienation by tenant for life*

(a) Co. Litt. 42 a.

(b) Such interests, unless made under an overriding power (e.g. under the S.L.A.), will come to an end with the expiry of the lessor's interest. But a lease for years by a freeholder never occasioned a forfeiture; because it did not convey the seisin.

For the tenant for life's statutory powers of alienation. See § 1440 *post*.

*Quasi fee
imple*

1256. A quasi fee simple is created by a limitation of land to a person and his heirs, to hold during the life of another, or by a limitation to a person and his heirs by an assurator whose interest in the land is a life interest only.

Co. Litt. 41 b.

A conveyance of an estate for lives to a man "his executors and administrators", has been held to give the executor a right as special occupant (*Northern v. Carnegie* (1859), 4 Drew. 587). *Quaere*: since the Land Transfer Act, 1897. A limitation of a term of years, or of pure personalty, to a person "and his heirs", simply, will confer upon such persons all the interest of the donor in such property absolutely (*Saltern v. Saltern* (1742), 2 Atk. 376; *Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538). A limitation to A and the heirs of his body of a term of years, or of pure personalty, since 1925, creates an entailed interest (L.P.A., 1925, s. 130 (1)).

*Alienation
of quasi fee
simple*

1257. A quasi fee simple may be disposed of by the owner thereof *inter vivos* or by testament in the same manner as an ordinary interest for life;^(a) but, if it is undisposed of by him at his death, it will go to his personal representative as assets.^(b) In all other respects, the qualities of a quasi fee simple are those of an ordinary interest for life.^(c)

(a) Co. Litt. 41 b
Seymour's Case (1612), 10 Co. Rep. 95 b } (*inter vivos*).
 Wills Act, 1837, s. 3 (by testament).

He cannot destroy an executory interest limited to take effect in defeasance of the quasi fee (*Re Barber's Settled Estates* (1881), 18 Ch. D. 624).

(b) Devolution by "special occupancy" was abolished by the A.E.A., 1925, s. 45 (1). There appears, however, to be no express reference to quasi fees simple or entails.

(c) Co. Litt. 41 b.

1258. A quasi entail is created by a limitation of land to a person and the heirs of his body, to hold during the life of another, or by a similar limitation to a person and the heirs of his body by a donor whose interest in the land is a life interest only.^(a) Any devise for the life of a person other than the devisee, and any devise made by a person having an interest *pur autre vie*, from which an intention to create an interest in tail can be gathered, will, if coming into operation before 1926, have a similar effect.^(b) A similar limitation of an estate for years will convey the whole of the donor's interest to the donee absolutely.^(c)

(a) *Doe d. Blake v. Luxton* (1795), 6 Term Rep. 289.

Campbell v. Sandys (1803), 1 Sch. & Lef. 281.

Slade v. Pattison (1835), 5 L.J. (Ch.) 51.

(b) *Wastneys v. Chappell* (1714), 3 Bro. Parl. Cas. 50.

Murthwaite v. Jenkinson (1824), 2 B. & C. 357).

In a devise coming into operation after 1925, technical words must be used (L.P.A., s. 130(2)).

(c) *Webb v. Webb* (1710), 1 P. Wms. 132.

Low v. Burron (1734), 3 P. Wms. 262.

Hodgeson v. Bussey (1740), 2 Atk. 89.

Read v. Snell (1743), *ibid.* 642.

Murthwaite v. Jenkinson (1824), 2 B. & C. 357.

Doncaster v. Doncaster (1856), 3 K. & J. 26.

Technical words of limitation are essential to create an entail, both in a deed and in a will, coming into operation after 1925, in any property whether real or personal (L.P.A., 1925, s. 130).

1259. A person entitled to a quasi entail in possession may convey, not only his own interest, but also the interests of the issue in quasi tail and the remaindermen expectant on the failure of such issue, by ordinary conveyance *inter vivos*.^(a) A tenant in quasi tail in remainder can only, without the concurrence of the quasi tenant for life in possession, convey his own interest and that of his issue.^(b) *Semble*: a tenant in quasi tail (other than a tenant in quasi entail after possibility of issue extinct) can devise his interest.^(c)

- (a) *Norton v. Frecker* (1737),
 1 Atk. 524 } (overruling *Low v. Burron* (1734), 3
Doe d. Blake v. Luxton } P. Wms. 262, on that point).
 (1795), 6 Term Rep. 289 }

Quaere : Can such a person destroy an executory interest limited in defeasance of his estate? The tenant of a quasi fee cannot (*Re Barber's Settled Estates* (1881), 18 Ch. D. 624).

- (b) *Wastneys v. Chappell* (1714), 3 Bro. Parl. Cas. 50.
Slade v. Pattison (1835), 5 L.J. (Ch.) 51.
Re Barber's Settled Estates, *ubi supra*.
 (c) L.P.A., 1925, s. 176. (But, again, quasi entails are not expressly mentioned in the section. And the provision only applies to testaments executed or republished after 1925 (*ibid.* subs. (4)).)

*Rights of
 tenant of
 quasi entail*

1260. A tenant in quasi tail has, with regard to the user of the land, only the powers conferred upon the original tenant by the instrument creating the tenancy for life; or, if there is no such instrument, or so far as such instrument does not extend, only the ordinary powers of a tenant for life (*ante*, §§ 1248–1251).

It is difficult to find any express authority for this statement; but it is equally difficult to suppose that a tenant for life could confer more powers than he himself has, by the simple process of alienating his estate.

*Determin-
 able life
 estate*

1261. When an interest is limited by non-testamentary writing to a person (without words of inheritance) until the happening of an uncertain event, or whilst a certain state of things shall continue, and the instrument became operative before 1926, such an interest will be a determinable life interest.^(a) A similar limitation in a testament will (*semble*) confer a fee simple determinable (*ante*, § 1060); unless the nature of the limitation is such as to show an intention on the part of the testator, that the interest shall not last beyond the lifetime of the devisee or some other person living at the time when the testament takes effect. In the latter event, the devisee will (probably) be deemed to take a determinable life interest.^(b)

STATUTORY EQUITABLE INTERESTS 629

- (a) Co. Litt. 42 a. (A common example of such an estate is created by a limitation to a woman *durante viduitate*. But the L.P.A., 1925, s. 60 (1), makes the matter doubtful. Probably a good deal would depend on the nature of the contingency.)
- (b) Wills Act, 1837, s. 28. (This enactment appears to be still in force, except in so far as it is inconsistent with the express provisions of the L.P.A., 1925, e.g. s. 130 (1). The same construction would apply to a deed coming into operation after 1925 (L.P.A., 1925, s. 60).

1262. If, in an action by a lessor or reversioner claiming land on the alleged expiry of an interest *pur autre vie*, it is proved by the plaintiff that any *cestui que vie* has been absent from the realm by the space of seven years together, such *cestui que vie* is, in the absence of proof of his life, presumed to be dead. *Absence of cestui que vi*

18 & 19 Car. II (1666), c. 11, s. 1.

1263. Any person entitled to any interest in expectancy after the death of any other person may, on proof of such fact, and that he has reasonable grounds for believing that such other person's death is being concealed, obtain from time to time an order of the High Court compelling production of such other person by the person alleged to be concealing his death. In default of such production, such claimant will be entitled to enter upon the land in question; unless the person ordered to produce the *cestui que vie* can satisfy the Court that he has failed, from no fault of his own, to make such production, and that the *cestui que vie* is in fact alive. *Production of cestui que vie*

Cestui Que Vie Act, 1707, ss. 1-4.
Re Owen (1878), 10 Ch. D. 166.

1264. A tenant *pur autre vie* who holds over after the death of the *cestui que vie* without the express consent of the person next entitled becomes a trespasser, even though his original entry on the land were lawful. *Holding over*

Cestui Que Vie Act, 1707, s. 5.

(3) FUTURE INTERESTS IN LAND

*Species of
future
interests*

1265. By operation of law or by act of the parties, an interest may, subject to the Rule against Perpetuities and to the other restrictions set forth in this Title, arise or be created to take effect in possession at a future date, certain or uncertain. Such an interest takes effect either by way of reversion, or of remainder, or of executory interest ; but (subject to § 1266 *post*), only as an equitable interest.^(a) Such an interest is alienable.^(b)

(a) L.P.A., 1925, s. 4.

(b) *Ibid.* s. 4 (2) (a). There was at one time considerable doubt on this point, owing to fears of "maintenance" (*ante*, § 955).

The notion of interests in land not clothed with possession may be said to be alien to a system of law in which possession was long regarded as the best, if not the only satisfactory, evidence of ownership. But in fact the recognition of such interests followed, almost inevitably, from the fundamental doctrine of tenure, which regarded every estate in land as derived from the estate of a superior ; for it was substantially, if not logically, impossible to deny to the superior an interest in the land, even though, by his own act, he had deprived himself of possession. Accordingly, some place had to be found for the interest of the superior ; and, ultimately, it was classed as a future estate, though, as VENTRIS, J., pointed out, in his elaborate judgment in the leading case of *Dighton v. Greenvil* (1693), 2 Vent. at p. 328, a reversion is really a present interest, because, in theory at least, it carries enjoyment of the services of the tenant, though it does not confer possession of the land. It was, probably, the technical difficulty of admitting two independent seisin of the same land, that produced the classification ; for it was impossible to allow seisin to the reversioner, where the particular tenant had a freehold estate. But, as a mere term of years did not carry seisin, a reversion thereon was, as we have seen (§ 1035, n., *ante*), for some purposes regarded as a corporeal hereditament, and, as such, carried seisin. Very early also was recognized another class of interests, which conferred neither present enjoyment of services nor present possession ; and the idea of the "remainder", which was evidently approaching in Bracton's day (*Liber De Legibus Angliae*, fo. 18 b) through the medium of conditional limitations, was fully recognized by Littleton (ss. 716-19) at the end of the fifteenth century, though the creation and operation of remainders were hedged about, as will appear, by elaborate rules to prevent abeyance or interruption of the seisin. Shortly after Littleton's time (Co. Litt. 378 a), a further development of the theory of

mainders admitted of their creation in favour of unascertained persons—a practice which, though condemned by Littleton (s. 721), obviously, when recognized, added greatly to the powers of disposition enjoyed by landowners. Meanwhile, the freedom allowed by the Court of Chancery in dealing with the use, or beneficial interest in land held by a fiduciary owner, permitted the creation of almost any future or contingent interests of an equitable kind; and when these were, by the Statute of Uses, converted into legal interests, a third class of future interests (known as “executory interests”) became possible. During the seventeenth and eighteenth centuries, the Common Law Courts continued to give some effect to the strict rules which still governed the creation and operation of remainders; but, as will be seen, during the nineteenth century, partly by statute, partly by judicial decision, remainders and executory interests have been very largely assimilated, at least so far as settlements dated after 1877 are concerned. Nevertheless, it is still quite impossible for any systematic statement of the law to ignore the technical differences between them.

1266. A reversion arises by operation of law whenever a smaller (“particular”) interest in land is created by act of the parties out of a larger, by any limitation which does not at the same time dispose of the residue of the interest of the creator to a third party.^(a) When the particular interest is an interest in freehold, the reversion arising in the creator is an incorporeal hereditament.^(b) When the particular interest is an interest for years, the reversion arising in the creator is for some purposes (§ 1033, n.) deemed to be a present interest subject to the term of years.^(c)

(a) Litt. s. 19; Co. Litt. 22 b. (The fact that the creator of the smaller interest expressly limits or reserves the residue to himself or his heirs, is immaterial (*ibid.*); except that such a limitation made the creator a purchaser for the limited purposes of the law of inheritance (Inheritance Act, 1833, s. 3)).

(b) And therefore it lay in grant at the common law (Litt. s. 554, etc.; *Throgmorton v. Tracey* (1555), 2 Dyer, 124 a. The last is one of the best general authorities on the nature of a reversion). And no dower could be claimed in respect of it (*D'Arcy v. Blake* (1805), 2 Sch. & Lef. at p. 390, *per* REDESDALE, C. (1)). Before 1926, a reversion might be legal or equitable depending on whether it was created out of a legal or an equitable estate. After 1925, a reversion upon a life interest must be equitable, for the land being settled, the legal estate is in the tenant for life or statutory owner (S.L.A., 1925, ss. 4, 16). Is the term “reversion” appropriate

to apply to such an interest? A legal reversion may still exist upon a term of years, e.g. if A having a legal fee simple grants a legal term to B, A has a legal reversion, and if B grants a sublease of his term to C, B also has a legal reversion.

- (c) *Walter v. Yalden*, [1902] 2 K.B. 304. (Apparently it lay both in livery and in grant at the common law (Co. Litt. 48 b and 49 a; *Anon.* (1537), 1 Dyer, 33 a; *Doe d. Wren v. Cole* (1827), 7 B. & C. 243)).

The interest retained by the creator of an estate in fee simple is called a "seignory". With rare exceptions (§ 1042, n.) a seignory must have been created before the passing of the statute *Quia Emptores* in 1290; and, not unnaturally, its incidents are now of small practical value. The most conspicuous was the right to claim the possession of the land as an "escheat"; should the tenant of the fee simple die intestate and without heirs. But this was little more than the right of every reversioner to claim the land on the expiry of the particular estate. And it is now abolished (A.E.A., 1925, s. 45 (1) (d)); but only as to deaths occurring after 1925. The owner of a reversion is, subject to express restriction, entitled to all the rights in respect of the land specified in § 1038 *ante*, and to such other rights as may have been expressly reserved, excepted, or otherwise created, by the instrument under which his reversion arises. This statement seems to-day to be true of the reversioner on a term of years for the sweeping change in the position of life and entailed interests made by the L.P.A., 1925, whereby these can only be created as equitable interests, has, in theory at least, made it difficult to maintain the rule laid down in the preceding sentence, at any rate in the case of reversions on freehold interests, the only true reversions at the common law. There is no tenure between the legal and the equitable owner. Apparently there is no attempt in the Act to deal with the difficulty, and it seems that the relation of lord and tenant is implicitly swept away in such cases.

The owner of a fee simple reversion on a term of years in land, whether absolute or subject to any incumbrances, estates, rights, or interests, vested or contingent, and every person claiming to have a power of disposing of such an interest for his own benefit, may apply to the Chancery Division of the High Court for a declaration of the validity of his title; and such declaration may be granted under the conditions prescribed by, and will be valid to the extent described in, the Declaration of Title Act, 1862, ss. 1, 48.

*Alienation
by
reversioner*

1267. The owner of a reversion on a term of years may by writing or testament alienate his interest without the attornment of the owner of the particular estate.

L.P.A., 1925, s. 151.

This rule, though contrary to feudal principles, was early established in the common law ; for Bracton (*De Legibus*, fo. 82), after some little hesitation, states roundly, that services can always be assigned, at any rate by Fine, though the right to receive the tenant's homage cannot be transferred without the tenant's consent. Apparently, Bracton's view soon prevailed ; for, though the attornment, or consent of the tenant to hold under the transferee, was still required, the *Old Natura Brevium* (temp. Edward III, ed. Pynson (n.d.) fo. xlix ; ed. Tottell (1584), ff. 168—70) contains two forms of writ (*Quid Juris Clamat*, and *Per Quae Servitia*) which can be traced back to Bracton's own day, to compel the tenant, not being a tenant in tail (*Bowles' Case* (1615), 11 Co. Rep. 80 a) to attorn or be attorned. It is worth noting, that Fitzherbert, whose *New Natura Brevium* was printed in 1534, though obviously aware of the existence of these writs (*op. cit.*, 49 H, 147 A), did not think it worth while to reproduce them ; but it would not, perhaps, be safe to attribute the omission to anything but the fact that they were not Writs Original, with which Fitzherbert was mainly concerned. The *Quid Juris Clamat* is given in the printed Register of 1687 (*Judicialium*, ff. 36, 57). Meanwhile, the passing of the Statute of Uses had dealt a further blow at the theory of feudal allegiance ; for it was soon afterwards held (*Heyward's Case* (1595), 2 Co. Rep. 35 a) that a conveyance which operated by virtue of the statute passed the reversion without attornment of the tenant. Finally, in 1705, a statute (4 & 5 Anne, c. 16, s. 9) abolished the necessity for attornment in all "grants and conveyances" of reversions. Apparently, attornment still remained necessary where the reversioner came in by adverse title (*Harris v. Booker* (1827), 4 Bing. 96). Any act which recognizes the position of the new reversioner will be sufficient as an attornment (*Gladman v. Plumer* (1845), 15 L.J.Q.B. 79). The attornment of the tenant to a stranger, which formerly worked serious detriment to the reversioner, no longer has any effect (L.P.A., 1925, s. 151 (2)) ; except (possibly) as a disclaimer involving forfeiture of the tenant's interest. A tenant is protected if he pays rent to the former reversioner without notice of the transfer of the reversion (*ibid.*). With regard to the form by which a reversion could be transferred, it seems quite clear that, subject to the necessity for attornment, a reversion, whether a true reversion on a freehold interest or a so-called reversion on a term of years, could, by Littleton's day, be transferred by deed of grant (Litt. ss. 567—8). It can now, of course, if an equitable interest, be transferred by mere writing.

1268. A possibility of reverter arises in the donor *Possibility of reverter* or his heirs upon a grant or devise of a determinable fee simple (*ante*, § 1050), or an interest defeasible on the happening of a condition subsequent (*post*,

§ 1324).^(a) Such a possibility may be devised, or assigned *inter vivos* by writing.^(b)

(a) *Doe d. Simpson v. Simpson* (1838), 4 Bing. (N.C.) 333.

Pemberton v. Barnes, [1899] 1 Ch. 544.

(b) Wills Act, 1837, s. 3.

Real Property Act, 1845, s. 6.

L.P.A., 1925, s. 4 (2).

Pemberton v. Barnes, *ubi supra*.

A fee simple conditional will merge in the possibility of reverter expectant upon it (*Doe d. Simpson v. Simpson*, *ubi supra*). A difficulty arises where there is a limitation of a contingent remainder in fee simple. According to Coke (Co. Litt. 342 b) and Blackstone (*Comm.* II, 107), the fee remained in abeyance so long as the contingency might, but did not, take effect; but it may be that the changes effected by the L.P.A., 1925, have altered the position. Clearly, however, some interest remains in the donor; but whether a reversion or some other species of interest may be doubted, though Fearne (*Contingent Remainders*, pp. 359–64) takes the former view. The point does not, at the present day, seem to be of practical importance. The Contingent Remainders Act, 1877, which, for about half a century, greatly affected the position of contingent remainders, was repealed by the L.P. (Am.) A., 1924, Sched. X, as obsolete after the changes in the law effected by the L.P.A., 1922.

*Remainders
vested and
contingent*

1269. Subject to the Rule against Perpetuities (*post*, §§ 1679–1685), a remainder is created whenever an interest of freehold is limited to a person other than the settlor, to take effect in possession on the expiry^(a) of a preceding interest of freehold duration,^(b) limited by the same conveyance.^(c) If such remainder is limited absolutely to an existing and ascertained person or persons, it is said to be “vested”; if it is limited in favour of an unborn or unascertained person or persons, or in favour of an ascertained person or persons on the happening of an event other than the expiry of the particular interest, it is said to be “contingent”.^(d) Upon the happening of the contingency, a contingent remainder is said to be vested.^(e)

(a) It is important to notice, that the remainder must contemplate neither

(a) premature determination of the particular interest, for that would involve an interruption of the seisin (which was disliked by the common law), nor (b) entry for condition broken, which

formerly could only be reserved to the donor, but can now be made exercisable by any person (L.P.A., 1925, s. 4 (3)), nor (c) an interval between the expiry of the particular interest and the taking effect in possession of the remainder, for that would have involved an abeyance of the seisin, a result also repugnant to the common law (See the arguments and opinions of the Court in *Colthirst v. Bejushin* (1550), 1 Plowd. 21, and *Corbet v. Stone* (1653), T. Raym. at p. 151). "On the expiry" appears, then, to be the correct phrase.

- (b) The necessity for a particular interest of freehold to support a remainder of freehold is obvious on common law principles; for a freehold interest could at the common law only be limited *in pais* by a feoffment, and a feoffment involved livery of seisin. But an apparent exception to this rule could be made by enfeoffing a tenant for years on behalf of an ascertained so-called remainderman, who thus, in fact, acquired a present interest subject to the term. This is the explanation of the passage in Littleton (s. 60), which has puzzled so many readers (*De Grey v. Richardson* (1747), 3 Atk. 469); and presumably the same result might be produced by an appropriately worded deed under the L.P.A., 1925, s. 56 (1). Obviously, no contingent remainder (so called) could be limited in either of these ways.
- (c) Co. Litt. 49 a.
- (d) *Ibid.* 378 a; *Whitby v. Von Luedecke*, [1906] 1 Ch. 783. (As pointed out above, Littleton (s. 721) was unwilling to admit the legality of remainders; but for once his distinguished commentator did not agree with him. The truth probably is, that the question was an open one in Littleton's day, and, before Coke wrote, had been definitely settled in the affirmative (*Colthirst v. Bejushin* (1550), 1 Plowd. 21).)
- (e) *Archer's Case, Baldwin v. Smith* (1597), 1 Co. Rep. 66 b.

Any attempt before 1926 to limit a freehold interest to commence at a future date, otherwise than as a remainder upon a particular estate of freehold, or as an executory interest, was void *ab initio* (*Buckler v. Harvey* (1596), Cro. Eliz. 450; *Barwick's Case* (1598), 5 Co. Rep. 93 b (3rd resolution); *Pay's Case* (1602), Cro. Eliz. 878). This rule, which was, of course, the result of the aversion of the common law from an abeyance of the seisin, has been rendered obsolete by the legislation of 1922-6. No remainder could be limited to take effect on the expiry of a fee simple (Co. Litt. 18 a; Blackstone, *Comm.* II, p. 164; *Musgrave v. Brooke* (1884), 26 Ch. D. 792)); but alternative contingent remainders in fee simple might be limited, in such a manner that only one of them could possibly take effect (*Loddington v. Kime* (1697), 1 Salk. 224; *Re White and Hindle* (1877), 7 Ch. D. 201). This is the logical result of the fact, that a fee simple is the greatest interest known to the law, combined with the working of the statute *Quia Emptores*, which forbids any attempt by a subject to create an estate in fee simple by sub-infeudation. Having limited a fee simple, the settlor has nothing left to give. The

rule applied, according to Lord Hardwicke, even to determinable fees (*Stafford (Earl) v. Buckley* (1750), 2 Ves. Sen. at p. 180). As an example of alternative contingent remainders, a limitation to A for life, remainder to B in fee simple if he should survive A, if not, to C in fee simple, would be a perfectly good limitation. But any attempt to provide for the transfer of the fee simple to C, after it had once vested in B, would be bad as a remainder ; though it might be good if effected by executory limitation.

NOTE ON THE LAW RELATING TO FUTURE INTERESTS BEFORE 1926.

For the detailed history of the law relating to remainders, see the previous edition, pp. 671–692.

Owing to the fundamental changes made by the legislation of 1925, it may be well to outline the rules that had existed at common law as modified by statutes prior to 1926. Apart from reversions there were two main types of future freehold interests ; I. Remainders, which could be legal or equitable ; II. Executory interests, which could be legal or equitable. Equitable remainders and equitable executory interests were referred to as future trusts.

1. *Remainders.*

The main rules relating to remainders were ;

(1) A remainder was void, unless when it was created, it was supported by a particular prior estate of freehold created by the same instrument. A grant to the first son of A was void if A had no son at the date of the grant. The reason was that the old common law method of conveying freeholds—feoffment with livery of seisin—required the feoffor (grantor) to be divested of the seisin, and the feoffee (grantee) invested with it at the moment the estate was created. The seisin was never allowed to be in abeyance (without an owner) for the lord could only take services and incidents from a person seised of the land. The rule against abeyance of seisin continued after a deed of grant became the normal method of creating an estate of freehold. Hence, in the above example, as there was no one to take the seisin the conveyance was a complete failure ; the seisin and the whole estate remained in the grantor. But a grant to Z for life remainder to the first son of A, a bachelor, was valid, for the seisin of Z supported the contingent remainder to A's son. The particular prior estate had to be a freehold, for a term of years did not carry seisin ; the seisin would be in the freehold reversioner. Hence a grant to B for ten years and then to C's unborn son, only created a valid lease to B, the reversion remaining in the grantor in fee simple. A grant to D for ten years and then to E in fee simple operated to vest the seisin (the legal fee simple) in E subject to D's lease ; E had a vested estate of freehold. If X had a legal fee simple and granted it to A for life in 1900, X had the legal reversion. If in 1910 X

disposed of his interest to B in fee simple, this would be a transfer of a reversion ; to be a remainder the particular estate and the remainder had to be created by the same instrument, e.g. to B for life and then to C in fee simple.

(2.) A remainder after a fee simple was void. The grant of a fee simple exhausted the grantor's whole estate, and there was nothing further to grant.

(3.) A remainder could not take effect before the natural termination of the particular estate. It could not take effect in defeasance of the particular estate ; it had to operate by way of succession and not by way of interruption. In a grant to A for life but if B is called to the Bar, to B immediately ; A took a life estate, B took nothing, the grantor had the reversion. The reason was that no one but the grantor and his heirs could take advantage of a right of entry on land for a condition broken.

(4.) A remainder was void unless it became vested during the continuance of the particular estate, or the moment it determined. This rule again was based on the principle that the seisin must not be in abeyance. The seisin had to vest in someone when the particular estate determined. In a grant to A for life and one week after his death to B, B took nothing. In a grant to C for life remainder to D's son when he attained twenty-one, the son took nothing unless he had attained twenty-one at C's death.

A contingent remainder was liable to destruction by surrender, merger or forfeiture of the particular estate before the contingent remainder had vested. For example, in a limitation to A for life remainder to his first son for life, remainder to B and his heirs ; if A surrendered his life estate to B before the birth of a son, the life estate would merge in the fee simple, and the son's remainder would fail for want of a particular prior estate of freehold to support it. Had A's son been born before the surrender, his remainder, being vested, could not have been destroyed. If A purchased B's fee simple before the birth of a son, A's life interest would merge in the fee simple and the son's remainder failed because there could be no remainder after a fee simple. Again, if A by any act caused a forfeiture of his life estate before the birth of a son, e.g. by a tortious conveyance, the son's remainder failed. Contingent remainders could be saved from destruction in these three ways by the device of trustees to preserve contingent remainders, attributed to Sir Orlando Bridgman during the seventeenth century. The Real Property Act, 1845, s. 8, provided that after 1844 a contingent remainder should take effect notwithstanding the determination of the particular estate by surrender, merger or forfeiture, in the same manner as if such determination had not taken place. The Act also abolished the tortious operation of a feoffment. But a contingent remainder was still liable to destruction if it failed to vest during the continuance of

the particular estate ; e.g. a limitation to H for life and after his death to such of his children as should be living at the death of his wife ; H died first, thus the children who were to take were not ascertained at the determination of the particular estate, and therefore the contingent remainder to the children failed (*Cunliffe v. Brancker* (1876), 3 Ch. D. 393). In consequence of this decision, the Contingent Remainders Act, 1877, was passed, which provided that, a contingent remainder created by an instrument executed after 2nd August 1877 (including a will confirmed after that date) should not fail because it had not become vested during the continuance of the particular estate, provided it would have been valid had it been construed as an executory interest. In effect, this means that provided the remainder complied with the first three rules set out above, but failed to satisfy the fourth rule, it would be saved from destruction provided it did not infringe the perpetuity rule. This rule requires that every future interest must vest in interest within the duration of a life or lives in being and twenty-one years after. In a limitation by deed, to A for his life remainder to any wife he may marry for life remainder to the children living at the death of the survivor, the interests of A and any wife of his were valid, but the interests of the children failed, because it could not be postulated with absolute certainty at the time the deed was executed that they would be ascertained within twenty-one years of the death of A, the life in being. In other words, A might be survived by a wife (who was not a life in being) by more than twenty-one years, and the children to take would not be ascertained within twenty-one years of A's death, i.e. the future interest might not vest within the perpetuity period, and therefore failed. Hence in a limitation by deed dated 1900 to A, a bachelor, for life remainder to his first son to attain twenty-one, if A died before the son attained twenty-one, the son's contingent remainder would be saved under the Act of 1877, for if any son of A attained twenty-one he was bound to do so within twenty-one years of A's death. But a similar limitation to B, a bachelor, for life remainder to his first son to attain thirty would fail, if B died before any son attained that age, because there could be no certainty at the time when the deed was executed that any son of B would attain thirty within twenty-one years of B's death, and therefore the contingent remainder infringed the perpetuity rule.

When equitable interests were revived in the seventeenth century, it became possible again to create equitable remainders ; e.g. unto and to the use of X and his heirs on trust for B for life and then on trust for the first son of B to attain twenty-one. The first three rules applied to equitable contingent remainders, but the fourth rule did not, and if B, in the example above, died before his son attained twenty-one, the seisin being in X and his heirs, the equitable contingent remainder took effect when B's first son attained twenty-one.

The Land Transfer Act, 1897, provided that on the death of a testator after 1897 all his realty should vest in his personal representatives, and as the legal estate was vested in them, it follows that a legal remainder could not be created under the will of a testator dying after 1897 (*Re Robson, Douglass v. Douglass*, [1916] 1 Ch. 116).

II. *Executory Interests.*

The common law took no cognizance of the use or equitable interest, and equity did not apply the strict common law rules about remainders to equitable interests. It has been seen that at common law in a limitation to A and his heirs, but when B marries to B and his heirs, B took nothing because two of the rules relating to remainders were violated. Prior to the Statute of Uses, 1535, a conveyance could have been made to X and his heirs to the use of A and his heirs but when B marries to the use of B and his heirs, under which X had the legal fee simple (the seisin), A had the use, or equitable interest in fee simple, which would pass over to B in fee simple when B married. This was known as a shifting use. Again, a grant to C (an infant) when he attains twenty-one was void at common law for reasons already stated. But a conveyance before 1535 to X and his heirs to the use of A (an infant) when he attains twenty-one, gave A a valid equitable life interest on attaining his majority. This was known as a springing use. After 1535, the effect of the Statute of Uses was to execute the use, that is, turn it into a legal estate, so that in the above examples A took a legal fee simple, which was liable to be defeated on B's marriage, and when B married he took the legal fee simple. C would take a legal life estate when he attained twenty-one. These legal executory interests thus violated the strict common law rules relating to legal contingent remainders. In a conveyance *inter vivos* it was essential to have the words "to the use of", or "in trust for", before the Statute of Uses would turn the use or trust into a legal estate. The court would not read them into a limitation and thus validate what was void under the common law rules, e.g. to C an infant when he attains twenty-one, was void; but to X and his heirs to the use of C an infant when he attains twenty-one was valid, for as X was seised to the use of C, the Statute of Uses, 1535, turned C's use into a legal estate for life on his attaining twenty-one, and he was deemed to be seised of it. But in wills, greater latitude was allowed, and the same interpretation was placed on a devise as if a use had been expressly inserted, e.g. a devise to C (an infant) when he attains twenty-one, gave C a valid legal estate for life when he attained his majority, whereas a grant *inter vivos* to C would have failed, there being no particular prior estate of freehold to support it, and no uses could be implied. In short, in conveyances *inter vivos*, shifting and springing limitations could only be created at law by a conveyance to uses; in wills such limitations were implied; effect was given to

them although no use was declared. Thus a devise to A and his heirs, but when B married to B and his heirs, gave A a legal fee simple which was liable to be defeated and pass to B in fee simple on B's marriage (shifting devise); and a devise to C an infant when he attains twenty-one, gave C a legal estate for life when he attained his majority (springing devise). When uses were revived at the end of the seventeenth century, equitable interests operating by way of shifting or springing trusts became possible; e.g. unto and to the use of X and his heirs on trust for A and his heirs, but when B marries on trust for B and his heirs; unto and to the use of X and his heirs on trust for C (an infant) when he attains twenty-one. A took an equitable fee simple, which was defeasible on B's marriage; and C took an equitable life estate on his attaining twenty-one.

Executory interests, whether legal or equitable, violated at least one of the common law rules relating to remainders, and they were not liable to destruction in the same way as remainders. They were valid provided they complied with the perpetuity rule. The question arose when a limitation was contained in a grant to uses or in a will, whether the legal contingent remainder rules should continue to apply. It was laid down in *Purefoy v. Rogers* (1671), 2 Wms. Saund. 380 that no limitation of a legal estate shall be construed as an executory interest if it can possibly take effect as a remainder. Hence if a limitation of a legal estate when created, was capable of complying with the legal remainder rules, it had to be treated as a legal remainder, even though it was contained in a grant to uses or in a will; it could only be construed as an executory interest if on the face of it, it was incapable of complying with the rules relating to legal contingent remainders. An example may help. If prior to 1877 a grant was made to X and his heirs to the use of A for life remainder to the use of his first son to attain twenty-one, and A died before the son attained that age, the son's contingent remainder failed. It could not be saved by treating it as an executory interest. That is, it was not possible to assert that on A's death the use resulted to the grantor and then sprang up in favour of A's son when he attained twenty-one. Now a grant to X and his heirs to the use of A's first son to attain twenty-one was an executory interest, it violated the first rule about contingent remainders. Here the use resulted to the grantor; but when A's first son attained twenty-one, the use, and with it the legal estate, sprang up in the son's favour as a valid legal executory interest.

The severity of the rule in *Purefoy v. Rogers* was to some extent mitigated by the Contingent Remainder Act, 1877, but the rule continued to apply to legal contingent remainders until 1926. But though it was rarely that a limitation was capable of being construed both as a remainder and as an executory interest, there was one important kind of limitation, viz. gifts to a class, which caused difficulty, and in respect of which, especially if made before 2nd

August 1877, the rule was important. Thus, if there was a devise of land to A for life, and, after his decease, to such of his children as should attain twenty-one, the limitation in favour of A's children was construed as a remainder; and, consequently, only those children who attained twenty-one before A's death were entitled, subject to the Contingent Remainders Act, 1877, to take under it (*Festing v. Allen* (1843), 12 M. & W. 279). And limitations by way of use were, for this purpose, construed in the same way as common law limitations (*Tapner d. Peckham v. Merlott* (1739), Willes, at p. 180, *per Curiam*). But if the words used by the settlor were inconsistent with the creation of a true remainder, e.g. if they contemplated a defeasance of the prior estate (§ 1269, n.), or if the gift were "to all the children of A who should attain twenty-one, whether in A's lifetime or afterwards", then the gift would be construed as an executory limitation, and, therefore, all A's children would have been admitted to share, whenever born (*Re Lethmere and Lloyd* (1881), 18 Ch. D. 524; *Blackman v. Fysh*, [1892] 3 Ch. 209). Even with regard to limitations created after 1877, the rule might still have some importance, e.g. a limitation to A for life, and after his death to the first of his sons who attained twenty-four. As an executory limitation, this would be clearly bad, as violating the Rule against Perpetuities (§ 1271 *post*); but it might take effect as a remainder if, in fact, A left a son who had attained twenty-four in A's lifetime (*Re Wrightson, Battie-Wrightson v. Thomas*, [1904] 2 Ch. 95). Also, it should be noted, that a devise which, originally, was clearly framed as a remainder, might, according to the circumstances existing at the testator's death, take effect as an executory limitation. Thus, if there was a devise to A for life (or in tail) with remainder to the first son of B who should attain twenty-one, in fee, and A died (without issue) in the lifetime of the testator, then, if at the testator's death B had no son who had attained twenty-one, the devise to such person became executory (*Pay's Case* (1602), Cro. Eliz. 878; *Hopkins v. Hopkins* (1734), Cas. temp. Talb. 44). Now that all future interests in land are equitable only, the importance of the rule has much diminished. But it may be that the decision in *Festing v. Allen*, *ubi supra*, still holds, as regards limitations made before 1926. For an important restriction on the operation of class gifts in remainder see *post*, § 1272. See *Cheshire Modern Real Property*, 5th Ed., pp. 430-460; *Megarry, Manual of Real Property*, pp. 113-137.

1270. Future legal estates of freehold are no longer possible.^(a) There cannot now be a legal life estate followed by a legal reversion or remainder, nor can there be a legal executory interest.^(b) Future equitable interests (future trusts) can still exist.^(c)

Future legal estates

- (a) The only two estates which can exist at law to-day are, (i) an estate in fee simple absolute in possession, and (ii) a term of years absolute (L.P.A., 1925, s. 1). The fee simple absolute must be in possession (*ante*, § 1041, n.). The legal remainder rules and the rule in *Purefoy v. Rogers* can no longer apply; the Real Property Act, 1845, s. 8, and the Contingent Remainders Act, 1877, have been repealed (L.P.(Am.)A., 1924, Sched. X). All legal remainders and legal executory interests existing before 1926 have been automatically converted into equitable interests.
- (b) The Statute of Uses has been repealed (L.P.A., 1925, Sched. VII).
- (c) These may correspond to the form of *pre*-1926 equitable remainders or equitable executory interests, but as no reason remains for distinguishing them, they are both conveniently called future trusts. When it is desired to give interests in land (as distinct from interests in the proceeds of sale thereof) to successive beneficiaries, the limitations must be effected as prescribed by the Settled Land Act, 1925, namely, by means of a vesting deed or vesting assent and a trust instrument. Land can no longer be settled by a single conveyance, say, to A for life, remainder to B when he attains twenty-one. Where A is of full age and the settlement is created *inter vivos*, the legal estate must be vested in A by means of a vesting deed and he holds it as a trustee for himself and all others beneficially interested in the land (*post*, § 1441, n.). A legal term of years absolute may take effect in possession or in reversion (L.P.A., 1925, s. 205 (1) (xxvii)), so it is still possible to create a future legal term of years, but if granted at a rent or in consideration of a fine, then to be legal, it must take effect within twenty-one years of the date of the instrument purporting to create it (L.P.A., 1925, s. 149 (3)).

*Rule against
perpetuities*

1271. All future interests in land are subject to the Rule against Perpetuities.^(a)

- (a) *Re Frost, Frost v. Frost* (1889), 43 Ch. D. 246.
Re Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535.
Whitby v. Von Luedecke, [1906] 1 Ch. 783.
Caddell v. Palmer (1833), 1 Cl. & Fin. 372.

This is not the place in which to deal with the Rule against Perpetuities, which, as a restriction affecting limitations of all kinds of property, will be found fully stated in a later passage (§§ 1679-1685, *post*). It is enough here to say, that the Rule renders void any limitation which might permit a claim to property to arise after the expiry of lives in being at the date of the limitation and a further period of twenty-one years. If no life interests are involved, the limitation is restricted in operation to an absolute period of twenty-one years from its date. There is the usual allowance for gestation where gestation actually exists. The reason why the rule is alluded to at this stage is that, somewhat recently, and after somewhat acute controversy, it has been established, so far as Courts of First Instance can lay down a rule of

law, that it applies to contingent remainders equally with executory interests, though, historically speaking, it was evolved in connexion with the latter class of interests. The cause of the extension of the Rule is probably to be found in the statutory changes made during the nineteenth century, by which the former liability of a contingent remainder to be defeated by the determination of the particular interest, was largely diminished. Of course, no reversion or vested remainder can be void for perpetuity ; because they take effect immediately on their creation.

1272. Where, in a conveyance of land *inter vivos*, there is a limitation which came into operation before 1926, of an interest to an unborn person for life, followed by a limitation of the same land to any issue (as such)^(a) of such person, the later limitation is void.^(b) Where similar limitations occur in a devise, they will, if the second limitation is of an entailed interest, have the effect of conferring on the first taker an entailed interest of such a nature that it would, unless barred, be capable of descending to the persons in whose favour the remainder is limited, and to them only (*cy-près*).^(c) This paragraph has no application to limitations coming into operation after 1925.^(d)

So-called
"double
possibilities"

- (a) *Re Bullock's Will Trusts*, *Bullock v. Bullock*, [1915] 1 Ch. 493.

Here the rule was extended to destroy a gift to the child of a living person. The decision was probably wrong, and was not followed in (*Re Garnham*, *Taylor v. Baker*, [1916] 2 Ch. 413).

- (b) *Whitby v. Mitchell* (1890), 44 Ch. D. 85. (This decision shows

(i) that limitations effected by way of use were subject to the rule, equally with common law remainders, (ii) that a settlement creating a special power of appointment and an appointment under it were, for the purposes of the rule, treated as parts of the same conveyance.)

Re Nash, *Cook v. Frederick*, [1910] 1 Ch. 1. (This case decided that successive equitable limitations were also subject to the rule.)

Re Clark's Settlement Trust, *Wanklyn v. Streetfield*, [1916] 1 Ch. 467 (copyholds).

- (c) *Monypenny v. Dering* (1847), 16 M. & W. 418.

Parfitt v. Hember (1867), L.R. 4 Eq. at p. 446. (In this passage, ROMILLY, M.R., states the *cy-près* doctrine as if it were applicable where the void limitation is only for life. *Sed quære*.)

Re Rising, *Rising v. Rising*, [1904] 1 Ch. 533.

Re Mortimer, *Gray v. Gray*, [1905] 2 Ch. 502. (This case shows, that if no entailed interest of recognized character would answer the description in the text, it was not possible to save the limitation

by implying an entailed interest of a novel character. Thus, a devise to the eldest (unborn) son of A, with remainder to his daughters *successively* in tail, would not confer upon A's son an estate in tail female; because such an estate did not descend to daughters successively. The *cy-près* doctrine appears to have been abolished in the case of wills coming into operation after 1925 (L.P.A., 1925, s. 130 (1)).

(d) L.P.A., 1925, s. 161 (1).

This rule, sometimes called the "Rule against Double Possibilities", which has recently been the subject of much discussion in the cases above quoted, was probably, in its origin, one of the many checks devised by the Courts to prevent the creation of an unbarrable estate tail. See generally *Holdsworth History of English Law*, Vol. VII., pp. 193-238. It was not applicable to limitations of chattels personal (*Re Bowles, Amedroz v. Bowles*, [1902] 2 Ch. 650). Neither was it applicable to vested remainders; for no remainder limited to an unborn person can possibly be vested. It was probably applicable to executory limitations; but there seems to have been no case on the point, unless *Re Clarke's Settlement Trust, Wanklyn v. Streatfield*, [1916] 1 Ch. 467 be such a case. It was quite independent of the Rule against Perpetuities (*Re Nash, ubi supra*, at p. 7, *per* FARWELL, L.J.); and is said to be much older than that Rule. Care must be taken to distinguish it from the Rule in *Shelley's Case* (§ 1273), which had no application when the second limitation was to a specific person or persons. The Rule against Double Possibilities only applied where the first limitation was for life; because a first limitation in tail would enable the first taker to get rid of all remainders by barring the entail, while there can be no remainder on a fee simple. For the purposes of the rule, the first taker was not deemed to be "unborn", if he were *en ventre sa mère* when the settlement came into operation (*Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 2 Ch. 411).

*Rule in
Shelley's
Case*

1273. When, in a settlement which came into operation before 1926, a limitation of an interest of freehold^(a) is followed, in the same conveyance, either mediately or immediately,^(b) by a limitation of an interest of the same kind^(c) in the same land to the heirs, or heirs of the body, of the person to whom the former freehold interest is limited, or, in a devise, by words signifying a similar intention,^(d) the effect of the subsequent limitation will be, to enlarge the interest taken under the former limitation into an interest in fee simple or in tail respectively, and not to confer a separate interest upon such heirs.^(e) For the

purposes of this paragraph, a testament and a codicil thereto,^(f) and a settlement and an appointment under a power contained therein,^(g) are regarded as parts of the same conveyance. This paragraph has no application to limitations coming into operation after 1925.^(h)

- (a) Including analogous interests in copyhold tenure (*Creation v. Creation* (1856), 26 L.J. (Ch.) 266; *Baker v. Parson* (1872), 42 L.J. (Ch.) 228; *Re Hack, Beadman v. Beadman*, [1925] Ch. 633). A limitation of an existing term of years to A, with a gift over, whether by lease or assignment, vested the whole term in him; and so the rule had no application in such a case. And a bequest of a term of years to A, with a gift over in favour of his heirs, also gave A the whole term (*Kinch v. Ward* (1825), 2 Sim. & St. 409). Even a limitation of a new term of years with a subsequent limitation to the "heirs and assigns" of the lessee, did not cause the rule to operate (*Tapner d. Peckham v. Merlott* (1739), Willes, at p. 180). A limitation to A and his heirs is no example of the operation of the rule, for there are no separate expressions giving an estate of freehold to A and a remainder to his heirs. (*Re McElligott, Grant v. McElligott*, [1944] Ch. 216, at p. 218).
- (b) In theory, the first and second interests do not unite so long as there is an intervening interest; and, consequently, the latter, even though contingent, is not destroyed, but takes effect as though the rule had never operated (*Bowles' Case* (1615), 11 Co. Rep. 79 b). It seems that if any intervening limitations are void for remoteness, the Rule in *Shelley's Case* would not prevent the subsequent limitations being bad (*Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502).
- (c) The rule did not operate to unite a legal estate and an equitable interest (*Baker v. Parson, ubi supra*). But two equitable interests, of a freehold nature, would have united (*Richardson v. Harrison* (1885), 16 Q.B.D. 85).
- (d) This is the most difficult point in the application of the rule. Apparently, in a deed, no word other than the word "heirs" would cause the rule to operate; since no other word was, at the common law, sufficient to limit an estate of inheritance. On the other hand, the word "heirs" in a deed would not necessarily bring in the rule; if it was clear that the settlor was using the word merely to indicate specific persons (*Evans v. Evans*, [1892] 2 Ch. 173). But, in a devise, owing to the greater laxity of interpretation, any expression indicating an intention to limit an interest to the heirs of the first taker would be sufficient to bring in the rule (*Roddy v. Fitzgerald* (1858) 6 H.L.Cas. 823, approved in *Van Grutten v. Foxwell*, [1897] A.C. 658); while, on the other hand, the use of the word "heir" (*Archer's Case, Baldwin v. Smith* (1597), 1 Co. Rep. 63 b; *Fuller v. Chamier* (1866), L.R. 2 Eq. 682) or even "heirs" (*Goodtitle d. Sweet v. Herring* (1801), 1 East, 264, recognized in *Jesson v. Wright* (1820), 2 Bli. at p. 18) would not have that effect, if it was clear from the context that the testator intended by these

expressions to indicate specific persons, and not successors in general. (*Re Routledge, Marshall v. Elliott*, [1942] Ch. 457).

(e) *Shelley's Case* (1581), 1 Co. Rep. 93 b.

Perrin v. Blake (1770), 1 Wm. Bl. 672; 4 Burr. 2579.

(f) *Hayes d. Foorde v. Foorde* (1770), 2 Wm. Bl. 698.

(g) *Fesson v. Wright, ubi supra*.

(h) L.P.A., 1925, s. 131. But see *Re Compton*, [1944] 2 All. E.R. 255

The mere fact that the settlor intended that the rule should not operate, was immaterial (*Roe d. Thong v. Bedford* (1815), 4 M. & S 362; *Van Grutten v. Foxwell, ubi supra*, at p. 684, per Lord DAVEY) But it was sometimes very difficult to distinguish between an intention that the rule should not operate, which did not prevent the application of the rule, and an intention to indicate specific persons, which does. It was held, in Ireland, that the rule applied to limitations of successive interests in an estate *pur autre vie* (*Macnamara v. Dillon* (1883), 11 L.R.Ir. 29). But the rule (which is much older than the decision in *Shelley's Case*), was based on feudal considerations which had, long before 1925, become anachronistic; and the provision of the L.P.A. 1925, s. 131, merely recognized this fact. It is believed that this provision was the first occasion on which a purely judicial rule was mentioned by name in an Act of Parliament.

Future corporations and "heirs" of unborn person

1274. Before 1926, no remainder could be limited to a corporation not in existence, or to the heirs of a person not born when the limitation was made, but a limitation by way of executory interest was valid.

Cholmley's Case, Cholmley v. Hammer (1597), 2 Co. Rep. at 51 b.

Sutton's Hospital Case (1612), 10 Co. Rep. at 26 b.

There is not much authority on this point; but the *dicta* in the two authorities quoted are accepted as law. Obviously, there could be no limitation of a present interest or of a vested remainder in either case; but it is possible that an executory limitation having a similar object, if it was carefully kept within the Rule against Perpetuities, might be good, e.g. a devise to A in fee, but if B (a bachelor) should beget a son who should die in A's lifetime, then to the heir of that son. A valid future trust could be created in such cases to-day.

Cross remainders in tail

1275. Where in a testament coming into operation before 1926 there was a single devise^(a) of land to two or more persons as tenants in common in tail, with a gift over in the event of such persons all dying without issue, then, from time to time, on the death without issue of any one of such persons, the survivor or survivors (if any) and the issue (if any) of a deceased

devisee or devisees (if any) took *per stirpes* (and, if more than one, as tenants in common) an entailed interest in remainder of the same kind in the share of such person dying without issue before the gift over took effect.^(b) The rule had no application to limitations *inter vivos*;^(c) except that it had been applied to marriage articles.^(d) Since cross remainders in tail would not be implied in a deed they cannot now be implied in a testament coming into operation after 1925.^(e) They can however be created by express limitation.

- (a) There was no implication if there were several gifts of separate properties (*Clache's Case* (1572), 3 Dyer, 330 b; *Gilbert v. Witty* (1621), Cro. Jac. 655).
- (b) *Anon.* (1570), Dyer, 303 b.
Huntley's Case (1574), 3 Dyer, 326 a.
- (c) *Cole v. Livingston* (1672), 1 Vent. 224.
Doe d. Tanner v. Dorvell (1794), 5 Term Rep. 518.
- (d) *West v. Errissey* (1727), 2 P. Wms. 349 (H.L.).
Twisden v. Lock (1768), Amb. 663.
- (e) L.P.A., 1925, s. 130, technical words of limitation are now essential to create an entailed interest in a will.

In *Cole v. Livingston* it was suggested that there could not be cross remainders by implication where the devise was to more than two persons. But this doctrine has since been disapproved (*Hannaford v. Hannaford* (1871), L.R. 7 Q.B. 116; *Re Ridge's Trusts* (1872), 7 Ch. App. at p. 668, *per* JAMES, L.J.). Obviously there can be no cross remainders in fee simple (see § 1269, n.). No undivided interest in land can now be a legal estate (L.P.A., 1925, s. 1 (6)), nor can an entailed interest.

1276. Where there is a single devise to two or more persons as tenants in common for life, with a gift over on the death of the survivor or all of them, then, from time to time, on the death of any of such persons, the survivor or survivors (if any) will take (and if more than one as tenants in common) an interest for life in the share of such deceased person, before the gift over takes effect.^(a) The rule has no application to limitations *inter vivos*; except that it has been applied to marriage articles.^(b)

*Cross re-
mainders
for life*

- (a) *Ashley v. Ashley* (1833), 6 Sim. 358.
Parfitt v. Hember (1867), L.R. 4 Eq. 443.

As there is a tenancy in common, the interest will subsist in the proceeds of sale and will be personalty owing to the trust for sale (L.P.A., 1925, s. 34).

- (b) *Twisden v. Lock* (1768), Amb. 663.

The latter part of this rule has now been shaken by the decision of SARGANT, J., in *Re Stanley's Settlement, Maddocks v. Andrews*, [1916] 2 Ch. 50, which draws a rather subtle distinction between constructive and implied limitations. (*Adamson v. A.-G.*, [1933] A.C. 257 at p. 279, *per* Lord RUSSELL of Killowen—a cross remainder over in personalty may be implied to give effect to the intention of the settlor); (*Re Bickerton's Settlement, Shaw v. Bickerton*, [1942] Ch. 84).

*Intermediate
income*

1277. In the case of testaments coming into operation after 1925, a contingent or future specific devise, and a specific or residuary devise of “freehold land” to trustees upon trust for persons whose interests are contingent or executory, will, subject to the Rules against Accumulations (§§ 1686–1690, *post*), carry the intermediate income of the devised property from the death of the testator, except so far as such income may be otherwise disposed of.

L.P.A., 1925, s. 175.

Presumably, “freehold land” means a freehold interest in land; and it is assumed that the “other” disposition means an express disposition referring to the devised property, not a mere residuary disposition.

*Failure of
issue*

1278. Where, in a testament made or revived since 1837, there is an executory devise over on failure of the issue of any person (whether such person takes an interest in the land under the testament or not), such failure of issue is construed (subject to § 1275) to mean a failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue; unless, by reason of such person having a prior interest in tail in the land, or of a preceding gift being, without any implication arising from such words, a limitation of an interest in tail to such person or issue, a

contrary intention appears by the testament.^(a) There is no such presumption in the case of an executory limitation by deed.^(b)

(a) Wills Act, 1837, s. 29. (The wording of the Act is confined to "issue"; but there is a disposition to extend the rule to other expressions, e.g. "male issue" and "children". See *Re Edwards, Edwards v. Edwards*, [1894] 3 Ch. 644; *Re Booth, Pickard v. Booth*, [1900] 1 Ch. 768.)

(b) *Fisher v. Wigg* (1700), 1 P. Wms. at p. 15, *per* GOULD, J.
Bamfield v. Popham (1703), 1 P. Wms. at p. 57, *per* POWER, J.
Morgan v. Morgan (1870), L.R. 10 Eq. 99.

Before the passing of the Wills Act, 1837, the rule was to treat such limitation as referring to an indefinite failure of issue, and, therefore, as creating an estate tail in the person the failure of whose issue was contemplated, unless such person's interest was greater than an estate tail (*Sunday's Case* (1611), 9 Co. Rep. 127 b; *Fisher v. Wigg, ubi supra*; *Bamfield v. Popham, ubi supra*; *Idle v. Cooke* (1705), 1 P. Wms. 70). Obviously, this construction was far from satisfactory to the executory devisees; inasmuch as the previous taker might bar the estate tail and destroy their chances. But it seems to have been applied, so late as 1870, to limitations by deed (*Morgan v. Morgan, ubi supra*, where, however, the estate already limited to the previous taker was, apparently, a fee simple). *Semble*, it cannot be applied to deeds taking effect after 1925; for such deeds can only create an entailed interest by technical words (L.P.A., 1925, s. 130 (1)).

1279. Where a person is entitled to an equitable interest in land for an interest in fee simple, or any less interest not being an entailed interest, or to any interest not being an entailed interest in any other property,^(a) with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or not, that executory limitation will be or become void and incapable of taking effect, if and as soon as there is living any issue (*semble*, of that person) who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. This rule only applies when the limitation is contained in an instrument coming into operation after 1882.^(b)

(a) The extension to pure personalty only applies to instruments coming into operation after 1925. (L.P.A., 1925, s. 134 (2).)

Issue attain-
ing 21

(b) L.P.A., 1925, s. 134 (1).

The effect of §§ 1278 and 1279 may be summarised as follows. Before the Wills Act, 1837, a devise to A and if he die without issue to B, gave A an entail, in the absence of a contrary intention. E would take if A's issue failed at any time, but A could have barred the entail and defeated B's interest. Under the Wills Act, 1837, s. 29 A took the fee simple, which was liable to be defeated by A leaving no issue alive at his death. If any issue of A were alive at A's death, E took nothing, but until A's death, A only had a defeasible interest. But after 1882, directly any of A's issue attained twenty-one, A became absolutely entitled, and the gift to B was defeated even though none of A's issue survived A (Conveyancing Act, 1882, s. 10). Even before A's interest became absolute, he could have disposed of the fee simple as a tenant for life under the Settled Land Act, 1882 s. 58 (now S.L.A., 1925, s. 20 (1) (iii)), and if his interest never became absolute, the purchase money on his death would belong to B. The provisions of the Conveyancing Act, 1882, s. 10, are re-enacted in L.P.A., 1925, s. 134, and extended to cover pure personality in the case of instruments coming into operation after 1925.

*Rights of
owner of
future
interests*

1280. Generally speaking, in the absence of express provision, a person entitled to a remainder or an executory interest has no right to possession or profits of the land, or to exercise any control thereover. But—

- (i) the owner of a vested remainder of inheritance is entitled (subject to § 1253 *ante*) to bring an action or apply for an injunction in respect of actual or apprehended waste or trespass on the land by a tenant for life or years or a stranger ;

Jefferson v. Jefferson (1683), 3 Lev. 130.

Bedingfield v. Onslow (1685), 3 Lev. 209.

Seagram v. Knight (1867), 2 Ch. App. at p. 632.

It is necessary that the plaintiff's interest should have existed when the waste was caused or the trespass committed. It is said (Co. Litt. 53 b) that a tenant in tail after possibility could not bring the old action of Waste. But it is doubtful whether this disability prevents him bringing the modern action of Case.

- (ii) the owner of a vested remainder for life,^(a) and the owner of a contingent remainder in fee,^(b) though he cannot obtain damages for

waste, may apply for and obtain an injunction to prevent the commission of unlawful waste, and an account of the profits received ;

- (a) *Dayrell v. Champness* (1700), 1 Eq. Cas. Abr. 400.
Mollineux v. Powell (1730), 2 Eq. Cas. Abr. 758, n. 4.

It seems doubtful whether a remainderman for life has a right to an account (*Pigot v. Bullock* (1792), 1 Ves. 479).

- (b) *Garth v. Cotton* (1753), 1 Ves. Sen. 546.
Williams v. Bolton (Duke) (1784), *ibid.* per Lord KING, C.

- (iii) a person in whose favour a valid executory limitation in defeasance of a fee simple is limited may obtain an injunction to restrain the commission of equitable waste by the tenant in fee simple, and an account of the profits received.

Turner v. Wright (1860), 2 De G.F. & J. 234.
Blake v. Peters (1863), 1 De G.J. & Sm. 345.

In two reported cases (*Aspinwall v. Leigh* (1690), 2 Vern. 218 ; *Claxton v. Claxton* (1690), 2 Vern. 152) owners of future interests were allowed to enter upon the land and cut timber for their own benefit, against the will of the tenants for life in possession. But one of these decisions, at least, was given during a vacancy of the Great Seal ; and neither is likely to be followed at the present day. It is conceived that the fact that a tenant for life in possession is now, in most cases, the estate owner under the S.L.A., 1925, will not deprive the remainderman of his equitable remedy under the old law.

B. PURELY EQUITABLE INTERESTS IN LAND

1281. A purely equitable interest in land is a *Purely equitable interest* right to some advantage derived from a corporeal or incorporeal hereditament, the legal ownership of which is vested in the person or persons having the equitable interest, or in some other person or persons.

The legislation of 1925 greatly increased the area of equitable interests in land. As we have already seen, they now include, for examples, all entailed and life interests and future interests in land. As we have also seen (§§ 1224-1227), the legislation of 1925 imposed certain rules which apply to *all* equitable interests in land. But, historically speaking, these new (statutory) equitable interests

are different in origin from the old equitable interests created by the Court of Chancery, which need separate treatment, and which it is proposed here to describe under the heading of "purely equitable interests". These latter arose, as is well known, from the desire to create interests in land which, while conferring all the profitable consequences of land-ownership, should be free from the onerous features attaching to the legal estate. Such a desire was wholly inconsistent with feudal principles, and was, accordingly, for long ignored by the Common Law Courts. But, favoured by the powerful protection of the Court of Chancery, the "use trust, or confidence of land (as these early equitable interests were called) rapidly established itself in practice; and its existence was clearly recognized by the legislature before the end of the fourteenth century (cf. 50 Edw. II (1376) c. 6). From that date, despite the steady refusal of the Common Law Courts to recognize them, uses of land occupied more and more of the attention of Parliament, which instead of attempting to repress them, at first contented itself with gradually assimilating them to legal estates (e.g. 15 Ric. II (1391) c. 5, s. 4 (mortmain) 1 Ric. III (1483) c. 1 (sale); 4 Hen. VII (1488) c. 17 (wardship) and 19 Hen. VII (1503) c. 15 (debts, reliefs, heriots, etc.)). Had this process been continued, the difference between the legal estate and the equitable interest would have gradually disappeared; but the exigencies of politics demanded a more drastic measure, and, in the year 1535, the Statute of Uses (27 Hen. VIII, c. 10) attempted to destroy equitable interests in land at a blow, by enacting (s. 1) that the should be deemed to be legal estates. As is also well known, the statute in the end failed completely to effect this part of its object (it indeed its framers really had this object in view). For the Court of Chancery, determined to preserve what had, in fact, become a national institution, ultimately enforced, as equitable interests, three classes of uses of land not "executed" by the statute. These were—(i) use of existing leaseholds (because no one could be "seised" of a term of years), (ii) active uses, i.e. uses in which the feoffee, or legal owner had active duties to perform, and (iii) "uses upon uses", i.e. use limited out of previously created uses. All these are now, more commonly, called "trusts"; though it is important to remember, that no technical words are necessary to express the idea of a fiduciary relation (§ 1728 *post*). Thus the institution of equitable interests recovered from what was at first thought to be a fatal blow, and indeed soon included interests protected by the Court of Chancery, but not created by way of trust, such as equities of redemption, and interests under contracts of sale and lease. Now that the onerous incidents attaching to the legal estate have largely disappeared, it has frequently been suggested that the separate existence of such equitable interests is unnecessary, and, indeed, in some ways harmful. But, in the absence of a system of hypothec, and a developed law of guardianship, it seems desirable to have some means by which infants, and persons of

insound mind or feeble capacity, may derive maintenance from land, without being burdened with the cares of legal ownership ; and, as we have seen, the result of the legislation of 1922-6 has been greatly to extend the sphere of equitable ownership.

1282. Purely equitable interests in land may arise from— *Classes of purely equitable interests*

- (i) the limitation of any interest in land to a person or persons with the expressed or inferred intent that, or a declaration by the owner of any interest in land that, such interest shall be held in whole or in part for the benefit of some other person or persons ("trust") ;
- (ii) the limitation of any interest in land to a person or persons to secure the payment of money or money's worth ("right" or "equity" of redemption) ;
- (iii) the making for valuable consideration of a contract (express or implied) by the owner of any interest in land to transfer that interest or any less interest to another person ;
- (iv) the creation by testamentary disposition, or by means of an agreement (express or implied), for valuable consideration, by the owner of any interest in land, of any charge thereon, in favour of another person ;
- (v) any alienation of an interest in land for valuable consideration which, though sufficient to pass an equitable interest, is insufficient to pass the legal estate ;
- (vi) the negligent or fraudulent act of the owner of any interest in land, by reason whereof another person has reasonably believed himself to acquire, for valuable consideration, a legal interest in the land.

In the above cases, (i) the person for whose benefit the limitation or declaration is made or deemed to be made, (ii) the person entitled to redeem the mortgaged property, (iii) the person who has contracted to acquire the interest, (iv) the person in whose favour the charge is agreed to be created, (v) the intended alienee, and (vi) the person who has purchased in reliance on the conduct of the owner, are said to have equitable interests.

In other words, as it was put to the author of the first edition by an eminent Equity Judge who did not live to see the legislation of 1925, "an equitable interest arises whenever, in the interest of *bona fides* and fair dealing, the Court thinks it ought to".

*Similarity
of legal and
equitable
interests*

1283. Generally speaking, as regards rules of succession,^(a) limitation, and construction,^(b) rules of validity and invalidity,^(c) the varieties of interest which can be created,^(d) the incidence of curtesy, dower, and other similar claims where these survive,^(e) and the liability for the debts of their owners,^(f) equitable interests are subject to the same law as the corporeal or incorporeal hereditaments out of which they are limited.

(a) *Edwin v. Thomas* (1687), 1 Vern. 489 (trust).

Fawcett v. Lowther (1751), 2 Ves. Sen. at p. 304, *per* Lord HARDWICKE, C. (equity of redemption).

Trash v. Wood (1839), 4 My. & Cr. 324 (trust).

Re Hudson, Cassels v. Hudson, [1908] 1 Ch. 655 (trust).

The exception from this rule was the case of the purely executory trust, which did not follow a special custom of descent (*Roberts v. Dixwell* (1738), 1 Atk. 607). An equitable interest in an incorporeal hereditament would be within the rule of the text; because the incorporeal hereditament itself would follow the descent of the servient tenement—at least where it issued out of the land (*Randall v. Jenkins* (1672), 1 Mod. Rep. 96; *Edwin v. Thomas*, *ubi supra*, *per* JEFFREYS, C.). Of course special customs of descent are now abolished in the cases of deaths after 1925 (Administration of Estates Act, 1925, s. 45 (1) (a)). But the point may still arise.

(b) E.g. the Rule in *Shelley's Case*, while it survived (*Richardson v. Harrison* (1885), 16 Q.B.D. 85). But here, again, executory trusts were an exception; if the result of applying the rule would

have been to defeat the settlor's intention (*Roberts v. Dixwell, ubi supra*). Also the Rule of Merger (*ante*, § 1039) applies where both interests are equitable, by analogy to law (*Brandon v. Brandon* (1861), 31 L.J. (Ch.) at p. 49, *per* KINDERSLEY, V.C.); but, in the case of equitable interests, the Court is even readier than where the interests are legal, to find reasons for preventing merger (*Whittle v. Henning* (1848), 2 Ph. 731).

Re Averill, Salisbury v. Buckle, [1898] 1 Ch. 523 (class gifts).

- (c) E.g. the Rule against Perpetuities (*Abbiss v. Burney, Re Finch* (1880), 17 Ch. D. 211), the so-called Rule against Double Possibilities, while it existed (*Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1), the Rules against Accumulation (L.P.A., 1925, s. 164 (*post*, §§ 1686–1690)), the Rules against Mortmain and Charitable Uses (Mortmain Acts, 1888 and 1891).

- (d) It was everyday practice, long before the legislation of 1925, to create equitable interests in fee simple, fee tail, for life, or years, present and future, out of socage estates. An equitable socage interest in tail may be barred in the same way as the corresponding legal estate (Fines and Recoveries Act, 1833, s. 1, *ante*, §§ 1231–1233). And it was even possible to create equitable interests which had no corresponding legal estates, e.g. a life interest in leaseholds (*Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821); though much the same result could be produced by an absolute bequest of leaseholds with an executory limitation over after the death of the legatee (*Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54). And in the latter case, at any rate if there is an express direction that he shall bear outgoings, acceptance of the bequest by the legatee "imposes in equity a personal obligation upon him" (*Re Loom, Fulford v. Reversionary Interest Society, Ltd.*, [1910] 2 Ch. at p. 233, *per* PARKER, J.).

- (e) *Sweetapple v. Bindon* (1705), 2 Vern. 536 (curtesy)

Otway v. Hudson (1706), *ibid.* 584 (free-bench)

Watts v. Ball (1708), 1 P. Wms. 108 (curtesy)

Vaughan d. Atkins v. Atkins (1771), 5 Burr. 2764 (free-bench)

Dower Act, 1833, s. 2 (dower).

- (f) Statute of Frauds (1677), s. 10 (as to deaths before 1926).

Judgments Act, 1838, s. 11.

A.E.A., 1925, s. 32 (as to deaths after 1925).

Solley v. Gower (1688), 2 Vern. 61.

Of course these claims only survive in rare cases since the legislation of 1925. (A.E.A., 1925, ss. 45 (1) (c), 46 (1).)

Some technical differences, however, exist with regard to the manner of enforcing the liability, e.g. an equity of redemption cannot be seized under an Elegit; though a receiver may be appointed. Additional remedies against the equitable interests in land of a judgment debtor are given to the creditor by the L.P.A., 1925, s. 195.

But even before 1926—

- (i) there was no direct liability for incidents of tenure upon an equitable interest or the owner thereof ;

Hall v. Bromley (1887), 35 Ch. D. 642.

Copestake v. Hoper, [1908] 2 Ch. 10.

- (ii) an equitable contingent remainder could never fail by reason of the determination of the particular estate before the contingency happened.

Abbiss v. Burney, Re Finch (1880), 17 Ch. D. 211.

Of course no contingent remainder can now, by reason of the recent legislation, *ante*, § 1270, be a legal estate ; and a devise of a contingent remainder of real estate which passes to the personal representative under the A.E.A., 1925, s. 1, will be treated as equitable for this purpose, even though the personal representative has assented to the devise before the particular estate determines (*Re Robson, Douglass v. Douglass*, [1916] 1 Ch. 116).

*Escheat of
equitable
interest*

1284. Where a person has died without next of kin and intestate in respect of any real estate consisting of an equitable interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person,^(a) such equitable interest will pass to the Crown as *bonâ vacantia*.^(b)

(a) Intestates Estates Act, 1884, s. 4 (repealed but re-enacted as to deaths after 1925, by the Administration of Estates Act, 1925, s. 1).

(b) A.E.A., 1925, s. 46 (1) (vi).

*Merger in
legal estate*

1285. Where the legal estate and a co-extensive and commensurate equitable interest in the same land become vested in the same person in the same right, the equitable interest is merged or extinguished in the legal estate.

Brydges v. Brydges (1793), 3 Ves. at p. 126, *per* Lord ALVANLEY, M.R.
Selby v. Alston (1797), *ibid.* 339.

Re Douglas, Wood v. Douglas (1884), 28 Ch. D. 327.

Re Selous, Thomson v. Selous, [1901] 1 Ch. 921.

This paragraph must be read as subject to the L.P.A., 1925, s. 185, and to § 1039 *ante*.

1286. No technical words were necessary, even in conveyance *inter vivos* coming into operation prior to 1926, for the limitation of an equitable interest of inheritance.^(a) But, in order that such an interest might pass by a conveyance *inter vivos*, it had to be evident from the circumstances, or the expressions used, that such was the intention of the conveying party.^(b)

No technical words necessary

- (a) *Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487.
Re Oliver's Settlement, *Evered v. Leigh*, [1905] 1 Ch. 191.
Re Arden, *Short v. Gamm*, [1935] Ch. 326.

In later conveyances the presumption is, of course, except in the creation of entailed interests, the other way (L.P.A., 1925, s. 60 (1)).

- (b) *Re Whiston's Settlement*, *Lovatt v. Williamson*, [1894] 1 Ch. 661.
Re Irwin, *Irwin v. Parkes*, [1904] 2 Ch. 752.
Re Thursby's Settlement, *Grant v. Littledale*, [1910] 2 Ch. at pp. 188-189, *per* FARWELL, L.J.

In *Re Irwin*, *Irwin v. Parkes*, *ubi supra*, the Court suggested as evidence of intention to pass an interest of inheritance (in addition to actual expressions in the conveyance)—(i) a reference to other property disposed of absolutely, (ii) the giving of valuable consideration by the purchaser. But in *Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636, SARGANT, J., held that this inference could only be drawn in limitations of beneficial interests; and his view has been adopted in *Re Bostock's Settlement*, *Norrish v. Bostock*, [1921] 2 Ch. 69.

1287. The owner of a present equitable interest is not entitled as of right to possession of the land, or the custody of the title deeds. But he may be put into possession of the land, and allowed the custody of the title deeds, at the discretion of the Court.

No right of possession

- Re Burnaby's Settled Estates* (1889), 42 Ch. D. 621
Re Wythes, *West v. Wythes*, [1893] 2 Ch. 369.
Re Bago's Settlement, *Bago v. Kittoe*, [1894] 1 Ch. 177.
Re Newen, *Newen v. Barnes*, [1894] 2 Ch. 297.
Re Richardson, *Richardson v. Richardson*, [1900] 2 Ch. 778.

The Court has been much more inclined to exercise its discretion in favour of the equitable owner since the passing of the Settled Land Acts (*Re Richardson*, *ubi supra*, at pp. 784-785, *per* STIRLING, J.). But, of course, under the S.L.A., 1925, the equitable owner described in this paragraph has also a legal title to the deeds and under s. 19 S.L.A.,

is that it is void against a subsequent purchaser unless duly registered, and the purchaser is not prejudicially affected by notice of it (§ 1404 *post.*) Most legal rights are not registrable and continue to bind every purchaser whether or not he has notice. A puisne mortgage, i.e. a legal mortgage not protected by a deposit of title deeds relating to the legal estate affected and certain charges imposed on land by statute, e.g. under the Agricultural Holdings Act, 1923, are examples of registrable legal interests. Some equitable interests are not registrable, e.g. a restrictive covenant affecting freehold land entered into before 1926, and these continue to bind everyone except a *bonâ fide* purchaser for value of the legal estate without notice and persons claiming title through him. It should be noted that some equitable interests which are not capable of being registered may be overreached and are therefore not binding on a purchaser (*ante* § 1225 n). Many equitable rights are registrable, and if registered they bind every purchaser irrespective of notice; but if not registered, they are void for non-registration against certain purchasers irrespective of notice (§ 1404 *post.*) A purchaser of land to-day can discover the existence of registrable charges by a search made in person of the Registers, or he may obtain an official search. The latter is advisable, because it is conclusive proof in favour of a purchaser; it protects a solicitor or trustee from liability for errors, and provides protection against incumbrances registered in the interval between the search and the completion, provided the transaction is completed within fourteen days of the date of the certificate of search (L.P. (Am.) A., 1926, s. 4. as amended). Registration and the provisions with regard to the overreaching effect of certain conveyance (*ante* § 1225 n) have made the purchaser's position with regard to equitable interests more secure than it was before 1926. To sum up generally, equitable interests are not enforceable against a purchaser of the land (§§ 1403, 1404 *post.*) even if he has notice of them before completion of his purchase when, (1) they are void for lack of registration; (2) when the estate owner conveying to him, (a) has power to overreach them (§ 1225 n, *ante*) or (b) is not bound by them on the ground of being a *bonâ fide* purchaser without notice.

Inquiries

1294. The inquiries and inspections referred to in § 1293 include—

- (i) an investigation of the title to the property purchased, for the proper period, i.e. at least thirty years prior to the date of the contract to purchase;

L.P.A., 1925, s. 44 (1).

Re Cox and Neve's Contract, [1891] 2 Ch. 109.

Re Nisbet and Potts' Contract, [1906] 1 Ch. 386.

Under an open contract (i.e. one without special conditions prescribing any length of title) the purchaser can insist upon a good root of title at least thirty years old, and all the subsequent documents which trace the dealings with the property. A good root of title is a document which deals with the whole legal and equitable ownership, describes the property and contains nothing to cast any doubt on the title. If the purchaser fails to investigate for the full period, he will have constructive notice of everything that he would have found had he investigated for the statutory period. But he is not affected with notice of any matter of which he might have received notice by making inquiries in regard to matters older than thirty years, unless he actually makes such investigations and inquiries (L.P.A., 1925, s. 44 (8)). Prior to 1926, a lessee taking a lease from a freeholder under an open contract was precluded by law from calling for the title to the freehold, and this is still the law. But before 1926 he was fixed with constructive notice of matters affecting the freehold although he was precluded from making inquiries (*Patman v. Harland* (1881), 17 Ch. D. 353). This decision has been abrogated, in the case of contracts made after 1925; where an intending lessee or assign is not entitled to call for the title to the freehold or leasehold reversion, he is not deemed to be affected with notice of any matter of which he might have had notice had he been able to contract that such title should be furnished (L.P.A., 1925, s. 44 (5)). But a lessee is still affected by notice of charges registered under the Land Charges Act (L.P.A., 1925, s. 198, *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610, at p. 619, *per* SIMONDS, J.). Where a covenantor was suing a lessor for the breach of a pre-1926 restrictive covenant, and joined the lessee as co-defendant, it was held the onus was on the covenantor to shew the lessee knew of the covenant (*Shears v. Wells*, [1936] 1 All E.R. 832).

(ii) an inspection of the land itself ;

Hunt v. Luck, [1902] 1 Ch. 428.

Generally speaking, a purchaser has constructive notice of the claims of all persons in possession, but not of their lessor's claims (*Hunt v. Luck*, *ubi supra*, at p. 432, *per* VAUGHAN WILLIAMS, L.J. ; *Green v. Rheinberg* (1911), 104 L.T. 149). The rights of such persons are not prejudiced by the new provisions of the L.P.A., 1925 (see s. 14).

(iii) an examination of the title deeds which he is entitled to inspect.

Worthington v. Morgan (1849), 16 Sim. 547.

Oliver v. Hinton, [1899] 2 Ch. 264.

This precaution is of great importance in view of the protection given to equitable mortgages by deposit of title deeds affecting the

legal estate by s. 13 of the L.P.A., 1925. But excessive precautions are not required ; e.g. the fact that the mortgagee is the mortgagor's solicitor does not make it the duty of a purchaser from the mortgagee to make special enquiries as to whether the mortgage has been paid off (*Powell v. Browne* (1907), 97 L.T. 854). A mortgagor who repays part of the mortgage money, is not affected with notice of facts which he would have discovered had he investigated the mortgagee's title when he made such partial repayment (*Berwick & Co. v. Price*, [1905] 1 Ch. 632). The owner of a prior legal estate can recover the title deeds of such estate from a *bonâ fide* purchaser for value of an equitable interest who had no notice of such legal estate when he gave value. But the Court will not deprive the latter of the title deeds in favour of the owner of a prior equitable interest. (*Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352. *Thorpe v. Holdsworth* (1868), L.R. 7 Eq. 139.) (But see *Newton v. Newton* (1868), 4 Ch. App. 143.)

For priorities among equitable interests see Conveyance by way of Mortgage (§ 1371 *post*).

SECTION III

RIGHTS AND LIABILITIES OF OCCUPIERS OF LAND

TITLE I—AS REGARDS THE PUBLIC

1295. As between himself and the public, and occupiers of other land generally (whether neighbours or not), the occupier of land may, subject to provisions of this Title, and to any special rights required by the public or the Crown or any person, or Act of Parliament, charter, dedication, grant, custom, or other lawful title, deal with the land in any way which does not create a nuisance (*ante*, §§ 837). In particular—

Rights of occupier

- (i) he has the exclusive right to the possession of the land, and the remedies for interference therewith specified in §§ 804, 805, 812, *ante*. (Trespass to Land) ;
- (ii) he has the exclusive right to catch, kill, and appropriate all animals *feræ naturæ* being on the land, which are fit for the food of man ;

Jannam v. Mockett (1824), 2 B. & C. 934.

Blades v. Higgs (1865), 11 H.L.Cas. at p. 631, *per* Lord WESTBURY, C.

Such animals, if killed on the land by a trespasser, or otherwise lawfully, become at once the property of the occupier (*Sutton v. Dy* (1697), 1 Ld. Raym. 250 ; *Blades v. Higgs*, *ubi supra*, at 62). There seems to be no authority as to the title to other wild animals improperly killed on the land. But, of course, in most cases killing would involve a trespass.

- (iii) he cannot bring an action merely for frightening away wild animals, not being fit for food,^(a) nor for enticing away game ;^(b) but he can bring an action for frightening away game from the land ;^(c)

- (a) *Hannam v. Mockett, ubi supra.*
- (b) *Ibottson v. Peat* (1865), 3 H. & C. at p. 650, *per* BRAMWELL, B.
- (c) *Ibottson v. Peat, ubi supra.*

- (iv) he has (*semble*) property in, or at least possession of, the young of wild birds hatched on the land, so long as they remain incapable of flight ;

Bishop of London v. N. (1522) Y.B. 14 Hen. VIII, fo. 1, pl. 1, *per* POLLARD, J.

Case of Swans (1592), 7 Co. Rep. at p. 17 b.

- (v) he may (*semble*) destroy domesticated animals unlawfully coming upon the land, in the circumstances specified in § 767 *ante* ;
- (vi) he has the exclusive right to fish in any non-tidal water flowing over the land ;

Blower v. Ellis (1886), 50 J.P. 326.

Micklethwait v. Vincent (1892), 67 L.T. 225.

Hanbury v. Jenkins, [1901] 2 Ch. 401.

- (vii) he has the right to take and use, to a reasonable extent, the water of any natural stream flowing in a defined channel past or over or under the land, whether such taking prejudicially affects the enjoyment of other persons or not, and for this purpose to have the water maintained in its natural condition and purity ;^(a) and also to have the natural flow of the water free from interference by the act of any other person, not being a riparian occupier exercising the right immediately above described ;^(b)

- (a) *Miner v. Gilmour* (1859), 12 Moo. P.C.C. at p. 156, *per* Lord KINGSDOWN.

Young (John) & Co. v. Bankier Distillery Co., [1893] A.C. 691.

Jones v. Llanrwst U.C., [1911] 1 Ch. 393.

Bleachers' Assn., Ltd. and Bennett and Jackson, Ltd. v. Chapel-en-le-Frith R.D.C., [1933] Ch. 356 (underground water running in a defined and known channel).

- (b) *Fear v. Vickers (No. 1)* (1911), 27 T.L.R. 558, C.A. But he has no right to take the water for purposes unconnected with his

riparian tenement (*McCartney v. Londonderry and Lough Swilly Rly. Co.*, [1904] A.C. 301).

- (viii) he has the right to abstract all water flowing over^(a) or through^(b) the land in undefined channels, whether such abstraction prejudicially affects other persons or not ;

- (a) *Rawstron v. Taylor* (1855), 11 Exch. 369.
Broadbent v. Ramsbotham (1856), 11 Exch. 602.
(b) *Popplewell v. Hodgkinson* (1869), L.R. 4 Exch. 248.
English v. Metro. Water Board, [1907] 1 K.B. 588.

On the other hand, an occupier of land is not entitled, by draining silt from his soil, to deprive the soil of another of its natural support (*Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217).

- (ix) he has (in the absence of previous alienation and reservation) the exclusive right of working and carrying away all minerals in the land,^(a) and the right to the possession of all objects found on or in the land, whose owners cannot be identified,^(b) except (*semble*) such as are found on land to which the public has access;^(c)

- (a) *Keyse v. Powell* (1853), 2 E. & B. 132.
Ashton v. Stock (1877), 6 Ch. D. 719.

This right is subject to exceptions. The Crown is entitled at common law to all gold and silver in any mine; petroleum existing in its natural condition in strata is vested in the Crown (Petroleum (Production) Act, 1934). Under the Coal Act, 1938, the Coal Commission acquired the coal and mines of coal throughout the country, compensation has been paid and the vesting date for acquisition was 1st July, 1942. These rights are now vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. For treasure trove, see § 1154, *ante*, which belongs to the Crown or the owner of the franchise, when the true owner cannot be discovered.

- (b) *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44.
Elwes v. Brigg Gas Co. (1886), 33 Ch. D. 562.
(c) *Bridges v. Hawkesworth* (1851), 21 L.J. (Q.B.) 75.
Hannah v. Peel, [1945] K.B. 509. See generally *Goodhart Essays in Jurisprudence and the Common Law*, pp. 76-90.

- (x) he is entitled to protect his land against any reasonably apprehended danger, not being caused by his own act or unlawful omission,

even though the result of such protection is to cause loss to other persons.

R. v. Pagham, Sussex Sewers Commissioners (1828), 8 B. & C. 355 (sea).

Nield v. L. & N.W.R. (1874), L.R. 10 Ex. 4 (flood water).

Greypensteyn v. Hattingh, [1911] A.C. 355, P.C. (locusts).

This right does not include the right to divert or impede the course of a natural stream (*Menzies v. Breadalbane* (1828), 3 Bli. N.S. 414), nor the right to divert mischievous substances, which have actually reached the land, on to the land of another person (*Whalley v. Lancashire and Yorkshire Rly. Co.* (1884), 13 Q.B.D. 131).

*Access to
public way,
or sea*

1296. The occupier of land abutting on a public way (whether a road or path,^(a) a river,^(b) or a lake^(c), or on the sea,^(d) has a right (subject to § 1297) of free access from the land to the way or sea, and from the way or sea to the land. If this access is interfered with, the occupier has a right of action for damages;^(e) but it is doubtful whether a mere interference with the resort of customers to the land by the way or sea, gives the occupier a right of action.^(f)

(a) *St. Mary Newington, Vestry v. Jacobs* (1871), L.R. 7 Q.B. 47.

Benjamin v. Storr (1874), L.R. 9 C.P. 400.

Fritz v. Hobson (1880), 14 Ch. D. 542.

Yorkshire, East Riding, G.C. v. Selby Bridge Proprietors, [1925] Ch. 841.

Marshall v. Blackpool Corporation, [1935] A.C. 16 *per* Lord ATKIN, at p. 22.

(b) *Rose v. Groves* (1843), 5 Man. & G. 613.

Buccleuch (Duke) v. Metropolitan Board of Works (1872), L.R. 5 H.L. at p. 463, *per* Lord CAIRNS.

Lyon v. Fishmongers' Co. (1876), 1 App. Cas. 662.

Hindson v. Ashby, [1896] 2 Ch. 1.

(c) *Marshall v. Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. at p. 172, *per* BLACKBURN, J.

(d) *A.-G. of Straits Settlement v. Wemyss* (1888), 13 App. Cas. 192.

Mellor v. Walmsley, [1905] 2 Ch. at p. 180, *per* STIRLING, L.J.

These cases show that the right of access is not destroyed by the fact that, owing to the action of the water, a strip of land is left dry between the occupier's boundary and the water. Care must be taken to distinguish between the right of the occupier, as a member of the public, to use the way, and his private right, as an occupier, to have access to it (*A.-G. v. Thames Conservators* (1862), 1 H. & M. at p. 32, *per* WOOD, V.C.; *Chaplin W. H. & Co., Ltd. v. Westminster Corpn.*, [1901] 2 Ch. 329).

- (e) *Rose v. Groves*, *ubi supra* (special damage need not be proved).
Edgington v. Swindon Corpn., [1939] 1 K.B. 86 (statutory right to erect omnibus shelters). The common law right of entrance and exit of a frontager from his land to a highway has been curtailed by statutes, e.g. Highway Act, 1835, especially since local authorities have vested in them the surface of the highway.
- (f) *Wilkes v. Hungerford Market Co.* (1835), 2 Bing. N.C. 281 }
Harper v. Haden (G.N.) & Sons, [1933] Ch. 298 } (aff.).
Rose v. Groves, *ubi supra*. }
Ricket v. Metropolitan Rly. Co. (1867), L.R. 2 H.L. at p. 188 } (diss.).
Beckett v. Midland Rly. Co. (1867), L.R. 3 C.P. at p. 100 }
Dwyer v. Mansfield, [1946] K.B. 437.

1297. The occupier of land is liable to be restrained by injunction at the suit of the Crown, if he attempts to remove a barrier (erected by the Crown) which protects other land from the inroads of the sea. *May not remove barrier against sea*

A.-G. v. Tomline (1880), 14 Ch. D. 58.

No alleged easement inconsistent with the effective existence of such a barrier can be acquired, even by an adjacent landowner (*Symes and Faywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1937] 1 K.B. 548, C.A.).

1298. The occupier of land is liable in respect of damage suffered by persons coming upon the land, in consequence of defects or dangers in or upon the land or erections thereon, to the extent specified in § 1062 (iv) *ante*. *Liability for defects*

1299. The occupier of land is not bound to fence against the public ; even where the land adjoins a highway.^(a) But, if he does not, he is not entitled to claim damages for injury committed to the land by domesticated animals being lawfully upon the highway, which stray on to the land.^(b) *Fences*

- (a) *Cornwell v. Metropolitan Sewers Commrs.* (1855), 10 Exch. at p. 773, per POLLOCK, C.B.
Hardcastle v. S.Y. Rly. and River Dun Co. (1859), 4 H. & N. 67.
Binks v. S.Y. Rly. and River Dun Co. (1862), 3 B. & S. 244.
Cox v. Burbidge (1863), 13 C.B. (N.S.) 430.

Ellis v. Banyard (1911), 28 T.L.R. 122. But see the concluding remarks of VAUGHAN WILLIAMS, L.J., in the last case.

Searle v. Wallbank, [1947] 1 All. E.R. 12, H.L.

(b) See § 761 *ante*. This last rule does not apply to trespasses by domesticated animals otherwise than from the highway.

*Dangerous
substances*

1300. An occupier of land is not responsible for injury caused by dangerous substances naturally growing on the land to (persons or) animals unlawfully coming on the land.^(a) But an occupier of land who brings and keeps thereon dangerous animals or substances which escape and cause injury, is liable to the persons injured to the extent specified in §§ 766, 1021–1023 *ante*.^(b)

(a) *Ponting v. Noakes*, [1894] 2 Q.B. 281.

(b) *Tubervil v. Stamp* (1697), 1 Salk. 13.

Fletcher v. Rylands (1868), L.R. 3 H.L. 330.

The latter doctrine has no application to substances not brought on to the land by the occupier, e.g. thistles (*Giles v. Walker* (1890), 24 Q.B.D. 656). And see § 1021.

*Traps and
spring guns*

1301. An occupier of land who sets traps or spring guns on the land (even with a view of protecting it from trespassers) without giving notice of the existence of such instruments, is liable for any injuries suffered by persons or animals, whether trespassers or not, in consequence of such setting.^(a) And an occupier of land who baits such traps in such a manner as to attract dogs (? other animals) on to the land, is liable to the owners of such dogs (? other animals) for any consequent injuries suffered by them.^(b)

(a) *Deane v. Clayton* (1817), 7 Taunt. 489 (Court equally divided).

Ilott v. Wilkes (1820), 3 B. & Ald. 304 (notice).

Bird v. Holbrook (1828), 4 Bing. 628.

Fordin v. Crump (1841), 8 M. & W. 782 (notice).

The common law rule does not seem to be affected by the existence of legislation making it a criminal offence to set engines dangerous to human life or limb (Offences Against the Person Act, 1861, s. 31); for *Fordin v. Crump* was decided after such legislation came into force by the 7 & 8 Geo. IV (1827), c. 18, s. 1.

(b) *Townsend v. Wathen* (1808), 9 East, 277.

1302. An occupier of land is liable for all damage *Fire* done by the escape of fire which he has lit, or caused to be lit, or negligently produced, on the land.^(a) But he is not liable for damage caused by the escape of a fire which accidentally begins on the land occupied by him.^(b)

(a) *Tubervil v. Stamp* (1697), 1 Salk. 13.

Vaughan v. Menlove (1837), 3 Bing. N.C. 468.

Filliter v. Phippard (1847), 11 Q.B. 347.

(b) Fires Prevention (Metropolis) Act, 1774, s. 86. (This clause is not confined in its operation to the Metropolis (*Richards v. Easto* (1846), 15 M. & W. 244).)

In *Filliter v. Phippard*, *ubi supra*, at p. 357, Lord DENMAN, C.J., criticising Blackstone's contrary view (*Comm.* I, 431), points out that no fire can be said to "begin accidentally" which is lit by the defendant or by his orders. There is liability if the fire is negligently allowed to spread. (*Musgrove v. Pandelis*, [1919] 2 K.B. 43. *Cf. Collingwood v. Home and Colonial Stores, Ltd.* (1936), 155 L.T. 550 and *Spicer v. Smees*, [1946] 1 All E.R. 489.). It was formerly held, that a railway company, having express statutory powers to run locomotives, was not liable, apart from negligence, for damage caused by sparks from such locomotives (*Vaughan v. Taff Vale Rly. Co.* (1860), 5 H. & N. 679). But this rule has been altered, so far as regards claims not exceeding £200 for damage to agricultural land or crops, by the Railway Fires Acts, 1905, s. 1, 1923, s. 1 (*A.-G. v. G.W. Rly. Co.*, [1924] 2 K.B. 1.).

1303. The occupier of land is, *prima facie*, liable *Public* to discharge all public burdens lawfully imposed *burdens* upon the land.

R. v. Toddington (Inhabitants) (1818), 1 B. & Ald. at p. 565.

R. v. Sutton (1835), 3 Ad. & El. 597.

Of course the owner may also be liable; and the burden may be expressly imposed upon him (cf. the case of Property Tax).

TITLE II—AS REGARDS NEIGHBOURS

*Division
of land*

1304. Land may be divided, for legal purposes, vertically or horizontally.

L.P.A., 1925, s. 205 (1) (ix).

The general proposition needs no authority ; but it may be pointed out, that the horizontal division may be made above the surface as well as below it, e.g. in the case of separate ownership of flats or chambers in a large block, or even of an air space (*Reilly v. Booth* (1890), 44 Ch. D. 12).

*Presumption
of occupation*

1305. There is a presumption that the occupier of the surface of land is also occupier of the sub-soil to an unlimited depth.

Keyse v. Powell (1853), 2 E. & B. at p. 144, *per Curiam*.

Seddon v. Smith (1877), 36 L.T. 168.

Mitchell v. Mosley, [1914] 1 Ch. at p. 450, *per COZENS-HARDY*, M.R.

But the presumption may be rebutted by circumstances, e.g. when a street or road is vested by statute in a public authority, so much only of the actual soil is vested in the authority as may be necessary for the purpose of preserving and maintaining and using it as a street or road ; and it is sometimes extremely difficult to tell how far down the rights of the public authority extend (*Tunbridge Wells Corporation v. Baird*, [1896] A.C. 434). The presumption stated in § 1305 has no application as between landlord and tenant for years (*Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562).

Boundaries

1306. When lands in the occupation of different persons are divided by a non-tidal river ^(a) or a road ^(b) (whether public or private), the presumption is, that the boundary between them is, as regards the sub-soil, the *medium flum* of the river or road.

(a) *Bickett v. Morris* (1866) L.R. 1 Sc. & Div. 47.

Blount v. Layard (1888), [1891] 2 Ch. at p. 689, n., *per BOWEN*, L.J.

Neither riparian owner may, however, obstruct or divert the passage of the stream by building out into the bed (*Bickett v. Morris*, *ubi supra*).

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- (b) *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304 (country road).
Re White's Charities, Charity Commissioners v. London Corporation,
 [1898] 1 Ch. 659 (street in town).
Holmes v. Bellingham (1859), 7 C.B.N.S. 329 (private road).
London City Land Tax Commissioners v. C.L. Rly. Co., [1913]
 A.C. 364.

And a conveyance of land abutting on such river or road will, unless there are expressions to the contrary, convey the soil as far as the *medium filum* (*Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. at p. 145, *per* COTTON, L.J.). But the presumption may be rebutted by special circumstances (*Beckett v. Leeds Corpn.* (1872), 7 Ch. App. 421). For example, it has no application where the boundary is a railway (*Thompson v. Hickman*, [1907] 1 Ch. 550).

1307. Where a plot of land is bounded by a natural stream or the sea, and by natural causes the position of the water is imperceptibly changed, the boundary line is changed accordingly; ^{*Accretion of soil*} (a) unless (perhaps) there is a definite boundary-mark otherwise fixed.^(b) This rule applies to tidal, non-tidal, navigable, and non-navigable water.^(c)

- (a) *R. v. Yarborough* (1824), 3 B. & C. 91 (accretion from sea).
Re Hull & Selby Rly. Co. (1839), 5 M. & W. 327 (loss).
Foster v. Wright (1878), 4 C.P.D. 438.
 (b) *Re Hull & Selby Rly. Co.*, *ubi supra*.
A.-G. v. Chambers (1859), 4 De G. & J. at p. 70, *per* CHELMSFORD, C.
Foster v. Wright, *ubi supra*, at p. 447, *per* LINDLEY, J.
Hindson v. Ashby, [1896] 2 Ch. 1 (doubtful).
 (c) *Foster v. Wright*, *ubi supra*, at p. 448, *per* LINDLEY, J.

The rule has no application to sudden diversions (*Re Hull & Selby Rly. Co.*, *ubi supra*, at p. 332, *per* ABINGER, C.B.). But the mere fact that the change can be identified by maps, etc., does not prevent it applying where the process of change is imperceptible (*Foster v. Wright*, *ubi supra*; *Hindson v. Ashby*, *ubi supra*). There seems to be no English decision on accretion in the case of lakes.

1308. When lands are separated by a hedge and artificial ditch, the presumption is, that the boundary ^{*Hedge and ditch*} between them is on that edge of the ditch which is farthest from the hedge.

- Vowles v. Miller* (1810), 3 Taunt. 137, *per* LAWRENCE, J.
Doe d. Pring v. Pearsey (1827), 7 B. & C. at p. 307, *per* HOLROYD, J.
Henniker v. Howard (1904), 90 L.T. 157.

The rule has (probably) no application to boundaries formed by natural watercourses (*Marshall v. Taylor*, [1895] 1 Ch. 641); and there is no presumption as to the width of an artificial ditch (*Wiles v. Miller*, *ubi supra*, at p. 38).

*Boundary
trees*

1309. A tree growing near a boundary belongs, in the absence of special provision, to the occupier of the soil in which the main body of the tree is; notwithstanding that its branches overhang adjacent soil. If the main body extends across the boundary, the tree will belong to the owners of the two plots as tenants in common.

Masters v. Pollie (1620), 2 Roll. Rep. 141 (doubtful).

Anon. (1622), 2 Roll. Rep. 255.

Waterman v. Soper (1698), 1 Ld. Raym. 737.

Holder v. Coates (1827), Mood. & M. 112.

Lemmon v. Webb, [1894] 3 Ch. at p. 20, *per* KAY, L.J.

These propositions are not covered by authority, but the cases so far as they go, support them.

For the rights of an occupier whose land is overhung by the branches of his neighbour's tree see *ante*, § 781 (v).

*Boundary
structure*

1310. A boundary wall or other party structure, if made such before 1926, is presumed to belong to the owners of the adjoining plots as tenants in common, in proportion as the base rests on each plot respectively.^(a) If so made after 1925, it is deemed to be severed vertically, and the owner of each part is entitled to such rights of support and user over the rest of the structure as may be requisite to confer rights corresponding to those which would have subsisted if a valid tenancy in common had been created.^(b)

(a) *Wiltshire v. Sidford* (1827), 1 Man. & Ry. K.B. 404.

Cubitt v. Porter (1828), 8 B. & C. 257.

Standard Bank of British South America (Africa) v. Stokes (1878), 9 Ch. D. 68.

Watson v. Gray (1880), 14 Ch. D. 192, at pp. 194-195, *per* FRY, J.

(b) Law of Property Act, 1925, s. 38.

By Sched. I, Part V, of the L.P.A., 1925, party structures existing before 1926 are placed on the new footing. Of course no

tenancy in common in a legal estate is now possible (L.P.A., 1925, s. 1 (6)). But, *semble*, this rule does not apply to interests less than legal estates.

1311. When a person is entitled, under a conveyance or exception, to all the mines or minerals in a piece of land, or to a mine of a particular mineral, he is entitled to the air-space occupied by such mines or minerals ; but this rule does not apply to the conveyance or exception of a particular mineral. *Mines*

Bowser v. Maclean (1860), 2 De G.F. & J. at p. 420, *per* Lord CAMPBELL, C., as interpreted by

Eardley v. Granville (1876), 3 Ch. D. at p. 834, *per* JESSEL, M.R.

Proud v. Bates (1865), 34 L.J. Ch. 406.

Hamilton (Duke) v. Graham (1871), L.R. 2 Sc. & Div. 166.

Batten Pool v. Kennedy, [1907] 1 Ch. 256.

The rule did not apply to the air-space occupied by minerals which, by virtue of copyhold custom, belonged to the lord of a manor. Therefore the latter, after working the minerals, had no right to use the space thus created for passing to tenements outside the manor (*Lewis v. Branthwaite* (1831), 2 B. & Ad. 437), and, therefore, presumably will have no right to do so now (L.P.A., 1922, Sched. XII, para. (5)). It will, of course, be realized, that a grant or exception of mines and minerals themselves is a totally different thing from a grant of the profit *à prendre* described in § 1190 *ante*. The latter conveys an incorporeal, the former a corporeal hereditament.

1312. The occupier of land has (apart from express agreement) a right to the support of the soil in its natural condition by adjacent^(a) and sub-adjacent^(b) land. *Right of support*

(a) *Birmingham Corp. v. Allen* (1877), 6 Ch. D. 284.

Jordeson v. Sutton, Southcoates and Drypool Gas Co., [1899] 2 Ch. 217.

(b) *Harris v. Ryding* (1839), 5 M. & W. 60. (But this was rather derogation from grant.)

Humphries v. Brogden (1850), 12 Q.B. 739.

Dixon v. White (1883), 8 App. Cas. at p. 842, *per* Lord BLACKBURN.

If buildings are placed upon the land, the soil is no longer in its natural condition (*Wyatt v. Harrison* (1832), 3 B. & Ad. 871, and other cases). But if, at the time of the severance of the surface and the sub-soil, buildings were standing on the surface, the occupier of the surface has, in the absence of special circumstances, a right to the support of them by the sub-soil (*Bonomi v. Backhouse* (1858), E.B. & E.

622; *New Sharlston Collieries Co., Ltd. v. Westmorland (Earl)* (1900), 82 L.T. 725 (H.L.)). It is important to notice, that the duty of support only falls on the occupier of so much adjacent land as would suffice to support the land of the plaintiff in its natural state (*Birmingham Corp'n. v. Allen, ubi supra*). The right of support of buildings by buildings, and of new buildings by land, is discussed *ante*, § 1179. It is a true easement, which may be acquired by prescription. At one time, there seems to have been a doctrine, that the owner of a building, as to which no right of support had been acquired by prescription or grant, was entitled to an action against his neighbour, if the latter, knowing of the existence of the building, negligently excavated his own land and caused the building to fall or be injured (*Chadwick v. Trower* (1839), 6 Bing. N.C. 1). But this doctrine seems now to be exploded (*Dalton v. Angus* (1881), 6 App. Cas. at p. 804, *per* Lord PENZANCE).

*Mine owner
and surface*

1313. The owner of mines or minerals who is not occupier of the surface has not, in the absence of special circumstances,^(a) the right to enter upon or destroy the surface, in order to win the minerals.^(b) But he has the right to win such minerals in any reasonable manner without injury to the surface.^(c)

(a) E.g. such as those in *Buccleuch (Duke) v. Wakefield* (1870), L.R. 4 H.L. 377.

(b) *Bell v. Wilson* (1866), 1 Ch. App. 303, followed in *Hext v. Gill* (1872), 7 Ch. App. 699.

Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co., [1906] A.C. 305.

This rule does not apply to the exercise of the rights of land-owners to minerals excepted from conveyances under the Railways Clauses Consolidation Act, 1845, ss. 77-9 (*Ruabon Brick and Terra Cotta Co. v. G.W. Ry. Co.*, [1893] 1 Ch. 427, since followed).

(c) *Rowbotham v. Wilson* (1860), 8 H.L. Cas. at p. 360, *per* Lord WENSLEYDALE.

Whidborne v. Ecclesiastical Commrs. for England (1877), 7 Ch. D. 375.

Hayles v. Pease and Partners, Ltd., [1899] 1 Ch. 567. (In this case the mine owners had power to enter upon the surface.)

*Incidental
damage*

1314. The occupier of a mine may, as between himself and the occupier or owner of a subjacent mine, work out the whole of his minerals in a usual and skilful manner; even though the result of such working may be to admit water to the upper mine and thence into the lower, or otherwise to damage the latter.

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Smith v. Kenrick (1849), 7 C.B. 515.

Wilson v. Waddell (1876), 2 App. Cas. 95.

But if a person for the convenience of working his own mine, pumps up water and causes a flow of water into a neighbouring mine which would not naturally have reached it, he is liable for any damage occasioned thereby. He has no right, by pumping or otherwise, to be an active agent in sending water from his own to an adjoining mine, and he is liable whether he does it purposely or not (*Baird v. Williamson* (1863), 15 C.B. (N.S.) 376, and *Crompton v. Lea* (1874), L.R. 19 Eq. 115). For the curious case in which the defendant's action abstracted brine from the plaintiff's mine, see *Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K.B. 822.

1315. The occupier of land has no right, in- Fences
dependently of statute, contract, prescription, or
custom,^(a) to call upon his neighbour to erect or
maintain fences.^(b) But if a person lawfully sinks a
shaft, or opens a quarry, through or in the surface
of the soil, or occupies such shaft or quarry when
made, he will be liable to an action if he does not
fence such shaft or quarry for the protection of the
occupier of the surface.^(c)

- | | | |
|---|---|-----------------|
| <p>(a) <i>Keighley's Case</i> (1609), 10 Co. Rep. 139 a
 <i>Star v. Rookesby</i> (1710), 1 Salk. 335
 <i>Lawrence v. Jenkins</i> (1873), L.R. 8 Q.B. 274
 <i>Child v. Hearn</i> (1874), L.R. 9 Ex. 176 (statute).
 <i>Firth v. Bowling Iron Co.</i> (1878), 3 C.P.D. 254 (contract).
 <i>Coaker v. Willcocks</i>, [1911] 2 K.B. 124 (custom).</p> | } | (prescription). |
|---|---|-----------------|

- (b) *Boyle v. Tamlyn* (1827), 6 B. & C. 329. (This case and the next show that the mere fact of continually repairing a fence is not conclusive evidence of prescriptive liability to do so.)
Hudson v. Tabor (1877), 2 Q.B.D. 290.

There is not even any liability implied from the fact that the claimant's land was demised to him by the adjoining occupier (*Erskine v. Adeane* (1873), 8 Ch. App. 756).

- (c) *Sybray v. White* (1836), 1 M. & W. 435.
Williams v. Groucott (1863), 4 B. & S. 149.
Hawken v. Shearer (1887), 56 L.J.Q.B. 284.

1316. The occupier of land is not, in the absence Careless farming
of contract or special custom, liable to his neighbour
for the consequences of mere omission to cultivate or
manage his land in a husbandlike manner.

Giles v. Walker (1890), 24 Q.B.D. 656.

Stearn v. Prentice Brothers, Ltd., [1919] 1 K.B. 394.

It may well be doubted whether this typically individualist doctrine will long remain in private law. It has already been overruled in the sphere of public law (Corn Production Acts (Repeal) Act 1921, s. 1 Sch. (1) (8) neglect to destroy certain weeds is an offence punishable on summary conviction).

*Accidental
fall*

1317. The occupier of land from which, without negligence on his part, a portion of the natural contents falls and injures the person or property of another is not liable for the loss thus caused.

Noble v. Harrison, [1926] 2 K.B. 332 (trees).

Pontardawe R.D.C. v. Moore-Gwyn, [1929] 1 Ch. 656 (rocks).

As has been pointed out (§ 1021 *ante*), the case is quite different if the object which causes the injury has been brought on to the land by the occupier for his own benefit.

TITLE III—AS REGARDS PERSONS HAVING FUTURE INTERESTS IN THE LAND

1318. The rights and liabilities of occupiers of *Waste* land, as regards persons having future or reversionary interests therein, are governed by the Law of Waste. Waste is either "legal" or "equitable".

For "ameliorating waste" see *ante*, § 1253.

1319. Subject to § 1253, legal waste consists of *Legal waste* any act ^(a) ("voluntary waste") or omission ^(b) ("permissive waste") which changes, or diminishes the value of, the inheritance.

- (a) *City of London v. Greyme* (1607), Cro. Jac. 181.
Darcy (Lord) v. Askwith (1618), Hob. 234.
Simmons v. Norton (1831), 7 Bing. 640.
West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624.
Rose v. Hyman, [1911] 2 K.B. at p. 243, *per* COZENS-HARDY, M.R.
- (b) *Anon.* (1564), Moore (K.B.) 62.
Griffith's Case (1564), Moore (K.B.) 69.
Sticklethorne v. Hatchman (1585), Owen 43.

1320. Equitable waste consists of such acts as *Equitable waste* change the character or diminish the value of the inheritance, and are an unconscientious abuse of the legal powers of the tenant.

- Aston v. Aston* (1750), 1 Ves. Sen. 264.
Burges v. Lamb (1809), 16 Ves. 174.
Ormonde (Marquis) v. Kynersley (1820), 5 Madd. 369.
Marker v. Marker (1851), 9 Hare, 1.
Micklethwait v. Micklethwait (1857), 1 De G. & J. 504.
Turner v. Wright (1860), John. 740.
Baker v. Sebright (1879), 13 Ch. D. 179.

The conception of "equitable waste" arose from the practice adopted by settlors of limiting life interests "without impeachment of waste". Such a limitation exempted the life tenants from all common law liability for waste, even in respect of active or "voluntary" waste. But, in the leading case of *Vane v. Barnard (Lord)* (1716), 2 Vern. 738, the Court of Chancery assumed a power to

restrain by injunction acts of malicious injury done by tenant for life "without impeachment"; and such acts now even involve (in the absence of express justification) a legal liability in damages (Law of Property Act, 1925, s. 135). Nevertheless, the term "equitable waste" continues to be used. Equitable waste is always voluntary, and consists of such acts as (1) pulling down or defacing the "principal mansion house", (2) cutting down timber planted for shelter or ornament, (3) despoiling the gardens and grounds of the house by wanton acts. The ordinary remedy for equitable waste was an account and impounding of the proceeds to follow the trusts of the settlement (*Honywood v. Honynood* (1874), L.R. 18 Eq. at p. 311, *per* JESSEL, M.R.). *Quære*: since the Judicature Act, 1873, s. 25 (3). For the case of collusion between a tenant for life and remainderman see *Birch-Wolfe v. Birch* (1870), L.R. 9 Eq. 683.

*Articles
severed*

1321. Things improperly severed from the freehold by a tenant impeachable for waste, or severed by tempest or other accident, belong to the owner of the first vested interest of inheritance in the land, and can be sued for by him in Trover against the tenant or a stranger.^(a) But where such things are lawfully severed by a tenant, the property therein vests in him.^(b)

(a) *Herlakenden's Case* (1589), 4 Co. Rep. 62 a.

Page's Case (1593), 5 Co. Rep. 76 b.

Bowles' Case (1615), 11 Co. Rep. at 81 b.

Berry v. Heard (1632), Cro. Car. 242.

Whitfield v. Bewit (1724), 2 P. Wms. 240.

Seagram v. Knight (1867), 2 Ch. App. at p. 632, *per* Lord CHELMSFORD, L.C. (Also an action for money had and received for the produce of the sale.)

The interest of a deceased tenant for life is liable for the proceeds of his waste (*Ormonde (Marquis) v. Kynersley* (1820), 5 Madd. 369).

(b) *Bowles' Case*, *ubi supra*, at 82 b (overruling on this point *Herlakenden's Case*, *ubi supra*).

Aston v. Aston (1750), 1 Ves. Sen. at p. 265, *per* Lord HARDWICKE, C.

*Ordinary
use and
precautions*

1322. Nothing is waste which merely involves the reasonable user of the land or buildings thereon, or the taking of the ordinary profits of the soil,^(a) or which is necessary for the protection or proper management of the inheritance.^(b)

- (a) *Barret v. Barret* (1628), Het. 34.
Phillipp (Phillips) v. Smith (1845), 14 M. & W. 589.
Harris v. Ekins (1872), 26 L.T. 827.
Saner v. Bilton (1878), 7 Ch. D. 815.

Semble, it is on this ground that a tenant, though not "without impeachment", is allowed to take the produce of periodical cuttings on "timber estates", i.e. lands customarily employed principally for the production of timber (*Bagot v. Bagot* (1863), 32 Beav. at pp. 517-18, *per* ROMILLY, M.R.; *Dashwood v. Magniac*, [1891] 3 Ch. 306), and to work open mines. As to estovers see § 1249 *ante*.

- (b) *Honywood v. Honywood*, *ubi supra*, at p. 311, *per* JESSEL, M.R.
Tucker v. Linger (1883), 8 App. Cas. 508.

1323. Generally speaking, it is an act of waste to *Fixtures* sever fixtures (*ante*, § 1030) from the freehold.

Co. Litt. 53 a.

But—

- (i) a tenant for life^(a) or years^(b) may, during his term, or (in the case of tenant for life) within a reasonable time afterwards,^(c) remove fixtures put up by him for purposes of trade, ornament, or domestic use; doing no serious damage to the inheritance, and making good such damage as may be done;

- (a) *Lawton v. Lawton* (1743), 3 Atk. 13.
Re Hulse, Beattie v. Hulse, [1905] 1 Ch. 406.
(b) *Poole's Case* (1703), 1 Salk. 368.
Re Moser (1884), 13 Q.B.D. 738.
Lambourn v. McLellan, [1903] 2 Ch. 268.
Spyer v. Phillipson, [1931] 2 Ch. 183.
(c) *Leigh v. Taylor*, [1902] A.C. 157.
Re Hulse, Beattie v. Hulse, *ubi supra*.

- (ii) the tenant of a farm or lands, under the Landlord and Tenant Act, 1851,^(a) and the tenant of an agricultural holding, under the Agricultural Holdings Act, 1923,^(b) has such rights to remove fixtures as are specified in those statutes respectively;

(a) S.3.

(b) Ss. 22 (i) (ii), 48, 54.

- (iii) the execution creditor of a tenant for years ^(a) (but not of a tenant for life) ^(b) may exercise for his own benefit the tenant's rights to remove fixtures.

(a) *Poole's Case*, *ubi supra*.

(b) *Winn v. Ingilby* (1822), 5 B. & Ald. 625.

Note

The liability for waste attaching to the different kinds of limited interests in land will be found specified under the respective Titles, *ante*, dealing with such interests. See especially §§ 1076, 1230, 1251.

ADDENDUM TO TITLE III

LEGAL WASTE

The following acts and omissions have been held or judicially stated to amount to legal waste :

A.—VOLUNTARY WASTE

1. Cutting timber.

Skelton v. Skelton (1677), 2 Swan. 170, n.

Whitfield v. Bewit (1724), 2 P. Wms. 240.

Perrot v. Perrot (1744), 3 Atk. 94.

Hussey v. Hussey (1820), 5 Madd. 44.

Honywood v. Honywood (1874), L.R. 18 Eq. 306.

As to what is "timber" see remarks of JESSEL, M.R., in *Honywood v. Honywood*, *ubi supra*, at p. 309, and *Dashwood v. Magniac*, [1891] 3 Ch. 306. No trees other than oak, ash, and elm, can be timber, except by virtue of local custom. A curious point should be noticed. If the settlor excepts the trees from the tenant's interest, then cutting them is not Waste, but Trespass (*Lewknor's Case* (1586), 4 Leon. 162, 225 ; *Goodright d. Peters v. Vivian* (1807), 8 East, 190). This was important when waste involved forfeiture.

2. Cutting other wood in a way which a prudent owner of the inheritance would not follow.

Stripping's Case (1621), Win. 15.

O'Brien v. O'Brien (1751), Amb. 107.

Kaye v. Banks (1770), Dick. 431.

Chamberlayne v. Dummer (1792), 3 Bro. C.C. 549.

Honywood v. Honywood (1874), L.R. 18 Eq. at p. 310.

3. Destruction or alteration of buildings.

Cooke's Case (1582), Moore (K.B.) 177.

City of London v. Greyne (1607), Cro. Jac. 181.

Gage and Smith's Case (1613), Godb. 209.

Greene v. Cole (1672), 2 Wm. Saund. 252, n.; 1 Lev. 309.

Young v. Spencer (1829), 10 B. & C. 145.

Whatever may have been the case at one time, the erection of new buildings is not now, *per se*, waste (*Jones v. Chappell* (1875), L.R. 20 Eq. 539).

4. Ploughing up ancient meadow or pasture.

Maleverer v. Spinke (1537), 1 Dyer, 35 b.

Darcy (Lord) v. Askwith (1618), Hob. 234.

Atkins v. Temple (1626), 1 Rep. Ch. 13 (ancient pasture).

Cole v. Peyson (1637), 1 Rep. Ch. 106 (do.).

Fermier v. Maund (1638), 1 Rep. Ch. 116 (do.).

Goring v. Goring (1676), 3 Swan. 661 (do. meadow).

Simmons v. Norton (1831), 7 Bing. 640.

There is, however, a distinct reaction against this doctrine (*St. Albans (Duke) v. Skipwith* (1845), 8 Beav. 354; *Rush v. Lucas*, [1910] 1 Ch. 437). And it has been greatly modified by s. 30 of the Agricultural Holdings Act, 1923.

5. Opening new mines, or reopening abandoned mines.

Saunders' Case (1599), 5 Co. Rep. 12 a.

Astry v. Ballard (1677), 1 Freem. K.B. 445.

Viner v. Vaughan (1840), 2 Beav. 466.

Bagot v. Bagot (1863), 32 Beav. at p. 516, *per* ROMILLY, M.R.

Clegg v. Rowland (1866), L.R. 2 Eq. 160.

Re Baskerville, Baskerville v. Baskerville, [1910] 2 Ch. 329.

Whether a mine is "open" or "dormant" (abandoned) is a question of fact in each case (*Bagot v. Bagot, ubi supra*). It is not waste for the tenant to sink new shafts or pits for the purpose of working open mines (*Clavering v. Clavering* (1729), 2 P. Wms. 388; *Cowley (Earl) v. Wellesley* (1866), L.R. 1 Eq. 656; *Elias v. Snowdon Slate Quarries Co.* (1879), 4 App. Cas. at p. 466, *per* Lord SELBORNE). But the bed of a stream is not an open mine; and a tenant for years, impeachable for waste, who takes from it minerals deposited by the action of the stream, is guilty of waste (*Thomas v. Jones* (1842), 1 Y. & C.Ch. Cas. 510).

B.—PERMISSIVE WASTE

6. Failure to scour ditch, whereby foundations of a house become rotten.

Stickelhorne v. Hatchman (1585), Owen, 43.

7. Suffering buildings to be out of repair, whereby they are destroyed by weather.

Anon. (1564), Moore (K.B.) 62.

8. Allowing a sea or river wall to become ruinous, whereby water enters and floods the land.

Griffith's Case (1564), Moore (K.B.) 69.

Anon. (1564), Moore (K.B.) 62.

9. Suffering cattle to bite the germins of underwood which the tenant has felled.

Gage and Smith's Case (1613), Godb. 209.

10. Failure to cultivate an agricultural holding in a husbandlike manner according to the custom of the country.

Wedd v. Porter, [1916] 2 K.B. 91.

EQUITABLE WASTE

The following acts have been held to amount to equitable waste :

11. Destroying or seriously damaging the principal mansion house.

Vane v. Barnard (Lord) (1716), 2 Vern. 738.

Rolt v. Somerville (1737), 2 Eq. Cas. Abr. 759.

Leeds (Duke) v. Amherst (Earl) (1846), 2 Ph. 117.

Where the settlor had virtually abandoned the mansion house before the date of the settlement, and the tenant for life pulled it down and used the materials for rebuilding, this was held not to be equitable waste (*Morris v. Morris* (1858), 3 De G. & J. 323).

12. Cutting down trees planted or left by an absolute owner for ornament or shelter for the mansion house ; (a) except for the purpose of preserving the remaining trees. (b)

(a) *Abraham v. Bubb* (1680), 2 Freem. (Ch.) 53.

Lawley v. Lawley (1717), Jac. 71, n.

Packington's Case (1744), 3 Atk. 215

Downshire (Marquis) v. Sandys (Lady) (1801), 6 Ves. 107.

Marker v. Marker (1851), 9 Hare, 1.

(b) *Ford v. Tynte* (1864), 2 De G.J. & Sm. 127.

Baker v. Sebright (1879), 13 Ch. D. 179.

Whether the trees are in fact ornamental or not is immaterial (*Coffin v. Coffin* (1821), Jac. 70; *Wombwell v. Belasyse* (1825), 6 Ves. 2nd ed. 116). The question turns on the intention of the settlor.

13. Cutting down thriving wood unfit for the purposes of timber.

O'Brien v. O'Brien (1751), Amb. 107.

Tamworth (Lord) v. Ferrers (Lord) (1801), 6 Ves. 419.

Smythe v. Smythe (1818), 2 Swan. 251.

SECTION IV
RESTRICTIONS ON USER AND
ALIENATION OF LAND

TITLE I—CONDITIONS AFFECTING LAND

1324. Subject to § 1339, and Book II, Section I, *Benefit of conditions* Title II, *ante*, a condition, precedent or subsequent, may be annexed to the holding of any interest in land.^(a) And the benefit of such condition, in so far as it affects a legal estate, may, if the condition has been imposed since 1925, be reserved in favour of any person, and the persons deriving title under him.^(b)

(a) Litt. s. 347.
Co. Litt. 214.

(b) L.P.A., 1925, s. 4 (3).

The rule of the common law was: that the right to take advantage of a condition affecting land could only be reserved in favour of the grantor of the interest and his heirs, and was inalienable by them. There were good reasons for this rule when high-handed assertion of legal rights was common; but it has long been anomalous. It still applies, apparently, to conditions affecting land imposed before 1926. Though the section referred to only mentions conditions affecting a legal estate, there appears to be little doubt that conditions affecting equitable interests in land are recognized (L.P.A., 1925, s. 3 (3)). Where the condition is annexed to a fee simple, it must observe the Rule against Perpetuities (*post*, §§ 1679—1685).

1325. Where the happening of the condition *Forfeiture* renders the holder of the estate liable to be deprived of it entirely, and no other person is for the time being entitled to the possession or receipts of the profits of the land, the person entitled to enforce the condition may peaceably re-enter, or recover possession by an action in the nature of Ejectment.

For the nature of the action of Ejectment see *ante*, §§ 813—818.

Waiver

1326. The benefit of a condition may always be waived ;^(a) but the actual waiver by the lessor or the persons deriving title under him, of the benefit of any covenant or condition in any lease, in any particular instance, is not deemed to extend to any instance, or to any breach of covenant or condition, save that to which it specially relates.^(b)

(a) This was doubtful at one time ; and Coke thought (Co. Litt. 214 b) that the breach of a condition annexed to a lease for years, if appropriately worded, might *ipso facto* determine the lessee's estate. But the text expresses the modern view.

(b) L.P.A., 1925, s. 148.

This section is not very happily worded ; but it has been thought better to follow the language of the statute. It applies to all leases, whenever made ; but only to waivers effected after 23rd July, 1860 (*ibid.* ss. 148 (2), 154). By the common law, a single waiver destroyed a condition, though not, probably, a covenant.

Licence

1327. A licence to do any act will, if granted to a lessee after the 13th August, 1859, extend only to the permission actually given, or the specific breach of any provision or covenant referred to, or to any other matter specifically authorized to be done, and will not (unless otherwise specified in the licence) prevent any proceeding for any subsequent breach.

L.P.A., 1925, s. 143 (1).

Doubtless this provision is aimed chiefly at preventing forfeitures or actions for breach of covenant ; but it is curiously wide in its operation. It applies to all leases, whenever made (*ibid.* s. 154).

Co-owners

1328. A licence to one of several lessees, granted after 13th August, 1859, to do any act prohibited to be done without licence, will not operate to extinguish a right of re-entry in respect of any breach of covenant or condition (*semble*, in the lease) by his co-lessees, or in respect of any breach by him in respect of any interest in such property not the subject of such licence.

L.P.A., 1925, s. 143 (3).

The three preceding paragraphs represent enactments rendered necessary by the existence of the strict rule of the common law, to the effect that a condition was "indivisible", i.e. once broken or dispensed with, was gone altogether (*Dumpor's Case* (1603), 4 Co. Rep. 119 b; *Fox v. Whitchocke* (1616), 2 Bulst. 290). The rule caused extreme inconvenience in practice, and worked harshly against the very persons whom it was intended to protect. It will be observed, that the statutory relaxations apply only to "leases", which, however, include underleases.

1329. Conditions are subject to the Rule against *Perpetuities* *Perpetuities* (*post*, §§ 1679, 1685).

L.P.A., 1925, s. 4 (3).

Re Hollis' Hospital Trustees and Hague's Contract, [1899] 2 Ch. 540.

Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter, [1912] 1 Ch. 337.

1330. The benefit of a right of entry for breach *Alienation* of a condition in respect of past and future breaches, may be disposed of by testament,^(a) or instrument *inter vivos*.^(b)

(a) Wills Act, 1837, s. 3.

(b) L.P.A., 1925, s. 4 (2).

There is no definition of "disposition" in the section; and the so-called definition given in s. 205 (1) (ii) (viii) of the Act does not help. Is the benefit of a condition a thing in action?

1331. Subject to § 1068 (severance of reversions *Severance* on leases), the severance, by act of the person in whose favour the benefit of a condition is reserved, of the interest to which such benefit is annexed, between two or more persons, whether as co-owners or otherwise, destroys the condition.^(a) This rule does not apply to severance by operation of law,^(b) nor to severance caused by the wrongful act of the person against whom the condition is sought to be enforced.^(c)

(a) *Leed's and Crompton's Case* (1586), cited in 4 Co. Rep. at 120 a. *Dumpor's Case* (1603), 4 Co. Rep. at 120.

(b) *Dumpor's Case*, *ubi supra*.

Moodie v. Garmon (1616), 1 Roll. Rep. at p. 331.

(c) *Knight's Case* (1588), Moore, K.B. at p. 203.

The reason for the rule is said to be, that he who enters for condition broken, ought to be in of the same estate which he had at the time of the condition created (*Dumpor's Case, ubi supra*).

*Relief
against non-
payment
of rent*

1332. In any action for forfeiture brought for non-payment of rent, the High Court has power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of (arrears of) rent, costs, and otherwise as could formerly have been imposed by the Court of Chancery, without the necessity of any new lease.

Judicature Act, 1925, s. 46.

The terms imposed by the Court of Chancery and confirmed by the Common Law Procedure Acts, 1852, ss. 210, 212; and 1860, ss. 1, 2, were, that all arrears of rent, with interest thereon, and costs, should be paid by the party seeking relief; and these terms are still enforced (*Barratt v. Richardson and Cresswell*, [1930] 1 K.B. 686). (*Chandless-Chandless v. Nicholson*, [1942] 2 K.B. 321.).

*Other con-
ditions*

1333. Subject to § 1335, no forfeiture for breach of a condition in a lease (other than a condition of re-entry on non-payment of rent) is, notwithstanding any stipulation to the contrary, enforceable until the lessor has served on the lessee or assignee of the lease a notice, specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee or assignee to remedy it, and, in any case, requiring the lessee or assignee to make compensation in money for the breach, and the lessee or assignee has failed within a reasonable time to remedy the breach (if capable of remedy), and, in any case, to make reasonable compensation therefor.

L.P.A., 1925, s. 146 (1), (5), (11), (12).

If the Leasehold Property (Repairs) Act, 1938 is applicable (*ante* § 1077), the notice must further inform the lessee of his right to serve a counter notice under the Act. The statutory notice need not contain a demand for compensation, if the lessor does not require to be indemnified (*Lock v. Pearce*, [1893] 2 Ch. 271), and it need not require the breach to be remedied if, as in the case of most negative

covenants, it is incapable of remedy (*Rugby School v. Tannahill*, [1935] 1 K.B. 87).

1334. Even when a lessor is proceeding, by action *During proceedings* or otherwise, to enforce a forfeiture for such breach, the Court may, subject to § 1335, on the application of the lessee or assignee, and notwithstanding any stipulation to the contrary, grant relief against such forfeiture, on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, as to the Court may seem fit.

L.P.A., 1925, s. 146 (2), (12).

The lessor, in such a case, has a legal right to recover all reasonable costs and expenses, whether relief has actually been granted, or the lessor has waived the breach (*ibid.* (3)).

1335. The provisions of §§ 1333 and 1334 do *No relief* not extend to any case in which forfeiture is claimed against a lessee, or assignee of a lease, on the ground of breach of a condition :

- (i) against assigning, under-letting, parting with the possession, or disposing, of the land leased, where the breach occurred before 1926, *or*
- (ii) subject to § 1337, against the bankruptcy of the lessee, or the taking in execution of the lessee's interest ; *or*,
- (iii) for allowing (in case of a mining lease) the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

L.P.A., 1925, s. 146 (8), (9), (10).

In cases (ii) and (iii) it is immaterial when the breach occurred.

1336. Where the lessor is proceeding to enforce a forfeiture for breach of a condition in the lease, even *Relief to under-lessees* in the circumstances specified in § 1335,^(a) or for

non-payment of rent, the Court may, on the application of an under-lessee, vest, for the whole term of the (head) lease or any shorter period (not being in either case longer than the unexpired term of the under-lease), the property comprised in the head lease, in such under-lessee, on such terms as the Court shall think fit.^(b)

(a) *Gholmeley School, Highgate (Wardens, etc.) v. Sewell*, [1894] 2 Q.B. 906.

Imray v. Oakshette, [1897] 2 Q.B. 218.

Gray v. Bonsall, [1904] 1 K.B. 601.

(b) L.P.A., 1925, s. 146 (4). L.P.(Amendment)A., 1929, s. 1.

The discretion allowed to the Court by this enactment is, obviously, very wide ; but in fact it is generally exercised only on the terms that the under-lessee shall, during the remainder of his term, accept responsibility for the liabilities of the head lease. It will not be exercised in favour of an under-lessee who has been a party to a breach of condition in consequence of his failure to investigate his lessor's title (*Imray v. Oakshette, ubi supra* ; *Matthews v. Smallwood, Smallwood v. Matthews*, [1910] 1 Ch. 777).

*Relief on
terms*

1337. The relief described in § 1334 may, notwithstanding the provisions of § 1335 (ii), be granted in the case of proceedings to enforce forfeiture of a lease on the ground of the bankruptcy of the lessee or the taking of his interest in execution.

But—

(i) it will not operate to suspend the forfeiture for more than one year from the date of the bankruptcy or execution, unless within that time the lessee's interest has been sold or absolutely contracted to be sold ;

L.P.A., 1925, s. 146 (10).

Re Castle (Henry) & Sons, Ltd., Mitchell v. Castle (Henry) & Sons, Ltd., (1906), 94 L.T. 396.

(ii) it cannot be granted where property comprised in the lease sought to be forfeited is—

(a) agricultural or pastoral land ;

(b) mines or minerals ;

- (c) a house used, or intended to be used, as a public-house or beershop ;
- (d) a house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures ;
- (e) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or the character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

L.P.A., 1925, s. 146 (9).

1338. The provisions of §§ 1333, 1334, apply to original and derivative under-leases, and to grants at fee farm rents, or securing rents by condition, and to agreements for leases or under-leases where the lessees or under-lessees are entitled to enforce the same; and the words “ lessor ”, “ lessee ”, and “ under-lessee ” have corresponding meanings. *Meaning of “ lease ”*

L.P.A., 1925, s. 146 (5).

Presumably, by a grant “ securing a rent by condition ” is meant a grant under which rent is secured by means of a condition.

1339. For the purposes of §§ 1333, 1334, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall, notwithstanding any stipulation to the contrary, take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach. *Provision against evasion*

L.P.A., 1925, s. 146 (7), (12).

TITLE II—COVENANTS (OTHER THAN COVENANTS IN LEASES) RUNNING WITH THE LAND

*Benefit runs
at law*

1340. The benefit of any covenant relating to land belonging to the covenantor, and intended to be beneficial to the user of other land, may be enforced by any owner or occupier of the last mentioned land who was contemplated as a beneficiary by the covenantor; whether such owner or occupier, or his predecessor in title, was a party to the deed containing the covenant, or not, and whether he was aware of the existence of the covenant when he acquired his land, or not.

L.P.A., 1925, ss. 56, 78, 79, 80 (3).

Renals v. Cowlishaw (1878), 9 Ch. D. 125.

Rogers v. Hosegood, [1900] 2 Ch. 388.

Dyson v. Forster, [1909] A.C. 98.

As between the original covenanting parties all covenants whether positive or negative (restrictive) are enforceable. If the covenant is between lessor and lessee, then provided (1) it touches and concerns the premises demised, and (2) that privity of estate (the relation of landlord and tenant) exists between the parties seeking to enforce it, the burden of the lessor's covenants and the benefit of the lessee's covenants run with the reversion, and the burden of the lessee's covenants and the benefit of the lessor's covenants run with the term. This applies to affirmative and restrictive covenants. If the covenant does not touch or concern the demised premises, but touches or concerns other land belonging to the covenantee, and is restrictive, it may be enforceable by an injunction under the doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774, even when no privity of estate exists between the parties. If the covenant does not touch or concern the demised premises or any land of the covenantor, it is enforceable only against the original covenantor (*Elphinstone, Covenants Affecting Land*, p. 1). At common law, the benefit of a covenant relating to land, whether positive or negative made with a covenantee having an interest in the land to which it relates, passed to his successors in title provided, (1) the covenant touched or concerned the land of the covenantee, (2) the covenantee, at the time of the making of the covenant had the legal estate in the land which is to be benefited,

and, (3) the assignee seeking to enforce it had the same legal estate in the land as, the covenantee had (*Sharp v. Waterhouse* (1857), 7 E. & B. 816 ; *Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K.B. 629 at p. 635.) ; *Shayler v. Woolf*, [1946] 1 All E.R. 464). This principle has been modified by the rules of equity. But the burden of a positive covenant (other than between lessor and lessee) did not run with the land at common law (*Cator v. Newton and Bates*, [1940] 1 K.B. 415). In equity the burden and benefit of restrictive covenants (but not positive covenants) could be assigned to run with the land. (*Tulk v. Moxhay* (1848), 2 Ph. 774).

A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument (L.P.A., 1925, s. 56). This replaces and extends s. 5 Real Property Act, 1845, the object of which was to get over the common law rule, that no one could sue upon an indenture, i.e. a deed *inter partes* (*aliter* in the case of a deed poll) unless he put his seal on the indenture. The section is confined to covenants of which the benefit is capable of running with the land (*Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K.B. 629, 635 ; affirmed *sub nom. Dyson v. Forster*, [1909] A.C. 98)—although Lord Macnaghten and Lord Dunedin doubted this. It does not extend to persons not yet in existence at the time of the conveyance (*Kelsey v. Dodd* (1881), 52 L.J., Ch. 34). In *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610, 625, SIMONDS, J., confined its operation to a person to whom the conveyance purports to grant something or with whom a covenant is purported to be made, although not named as a party to the conveyance. In *Dyson v. Forster*, *supra*, a covenant with "owners . . . for the time being" of certain lands was held to be thereby annexed to land then vested in a predecessor in title of the plaintiffs. In *Re Ecclesiastical Commissioners for England's Conveyance*, [1936] Ch. 430, similar results followed where a purchaser covenanted with the vendors and their successors, "and as a separate covenant with their assigns, owners for the time being of the land adjoining or adjacent to the said land hereby conveyed". The covenantor thereby conferred the benefit of his covenant, not only upon the vendors, but also upon persons who had purchased adjoining land from the vendors at an earlier date, and the covenants were enforceable by them and persons claiming under them. It appears that the operation of s. 78, L.P.A., 1925, as to the benefit of a covenant relating to the land of the covenantee, does not make the benefit of covenants affecting freehold, run with the land, unless it would have run before the Act. This also applies to s. 80 (3) L.P.A., 1925, —there must still be an expression of an intention to benefit the land of the covenantee ; and to show what lands are intended to be bound and benefited by the covenant.

*When
benefit runs*

1341. In order that the benefit of such a covenant may run with land it must touch and concern the land to be benefited and retained by the covenantee at the time of the covenant.

Rogers v. Hosegood, [1900] 2 Ch. 388 at p. 395, *per* FARWELL, J.

Re Ballard's Conveyance, [1937] Ch. 473, at pp. 480-1, *per* CLAUSON, J.

Zealand (Marquess) v. Driver, *ibid.* 651, at p. 660, *per* BENNET, J.

The covenant must either affect the mode of occupation of the land, or its nature, quality or value. It is not enough that some personal advantage can be derived from it by successive owners. Local authorities may enforce the covenant although they retain no land (Town and Country Planning Act, 1932, s. 34).

*Conditions
for enforce-
ment*

1342. In order to enforce the benefit of such a covenant the person seeking to enforce it must prove,

- (i) that he was an assignee of the land to which the benefit was already annexed,^(a) or
- (ii) that he was an assignee of the benefit of the covenant and of the whole or part of the land for the benefit of which the covenant was made,^(b) or,
- (iii) that he and the person against whom he is seeking to enforce it both own the land subject to a building scheme. In all three cases he must own some interest in the land when he seeks to enforce the covenant.

- (a) This is a question of construction of the instrument creating the covenant. The covenant may be annexed if it is expressed to be for the benefit of, or intended to run with, definite land, or is made with the covenantee as owner for the time being of such land and others claiming under him, as in *Rogers v. Hosegood*, *supra* at p. 389. The mere fact that the observance of the covenant would benefit the land is not sufficient (*Renals v. Cowlishaw* (1879), 11 Ch. D. 866; *Reid v. Bickerstaff*, [1909] 2 Ch. 305). A vendor may (1) take a covenant for his own benefit from a purchaser, or (2) for the benefit of the vendor as owner of other land of which the land sold forms part and intended to protect and benefit such unsold land. A covenant of the first kind will not pass automatically with the land, but may be expressly assigned; a covenant of the second kind passes automatically (*per Curiam* in *Zealand v. Driver*, [1939] Ch. at p. 7). Despite a clear intention

to annex the benefit, there can be no effective annexation, if the area of the land to be benefited is greater than can reasonably be benefited, and the benefit will not pass even to a purchaser of the whole of the land, for the court will not sever the covenant (*Re Ballard's Conveyance*, *supra*). But where it is expressed to be for the benefit of the whole or part or parts of the land retained, it may be enforced by a purchaser of any part which the covenant in fact benefits (*Zetland v. Driver*, *supra*). The benefit of the covenant then attaches to the land and passes automatically to each successive owner for the time being.

- (b) Even if the benefit has not been annexed as above, the plaintiff will be able to enforce it, if the benefit of the covenant has been expressly assigned to him at the time when the whole or part of the land was assigned to him. An express assignment is not necessary if the circumstances show that the benefit of the covenant was intended to be included in the sale of the land. But once the land is sold, the benefit of the covenant cannot be subsequently assigned (*Re Union of London and Smith's Bank, Ltd.'s Conveyance*, *Miles v. Easter*, [1933] Ch. 611; *Re Rutherford's Conveyance*, *Goadly v. Bartlett*, [1938] Ch. 396).
- (c) See § 1346, *infra*.

1343. The burden of such a covenant, not being *Burden does not run* a restrictive covenant,^(a) and not being made between lessor and lessee,^(b) does not run with the land either at law or in equity, i.e. it cannot be enforced against any owner of the land intended to be affected (other than the original covenantor and his personal representative), whether such owner acquired his interest with knowledge of the covenant, or not.

- (a) *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750.

Gator v. Newton and Bates, [1940] 1 K.B. 415.

- (b) Covenants between lessor and lessee are dealt with in § 1080 *ante*.

1344. The burden of such a covenant, being *Except in equity* restrictive, subject to § 1345, even though not made between a lessor and a lessee, if entered into before 1926, runs with the land in equity,^(a) but not at law; i.e. it can be enforced by injunction (and, *semble*, by a judgment for damages^(b)), but only against a person who, being contemplated as being bound by the covenant, acquires an interest in the land of the original covenantor otherwise than as, or through, a purchaser

of the legal estate ^(a) for valuable consideration without notice of the covenant.^(d) If entered into since 1925, it will not bind a purchaser of the legal estate in the burdened land for money or money's worth unless it is registered in the appropriate register under the Land Charges Act, 1925 ^(e). Further, if the covenant is made after 1925, and is registered, it is deemed, unless a contrary intention appears, to be made by the covenantor on behalf of himself and his successors in title, including the owners and occupiers for the time being of such land, and the persons deriving title under him or them, so that the burden will be attached to the land ^(f).

(a) *Tulk v. Moxhay* (1848), 11 Beav. 571.

(b) *Sayers v. Collyer* (1884), 28 Ch. D. 103. Chancery Amendment Act, 1858, s. 2.

Wilkes v. Spooner, [1911] 2 K.B. at p. 480, per SCRUTTON, J.

(c) *Wilkes v. Spooner*, [1911] 2 K.B. 473.

(d) The general doctrine as to "implied notice" of equities applies; e.g. a person who acquires the estate of the covenantor without investigating the title is bound, if, on the ordinary investigation, he would have discovered the equity (*Nisbet and Potts' Contract, Re*, [1906] 1 Ch. 386).

(e) Land Charges Act, 1925, ss. 10 (1), D. (ii); 13 (2). But even if not registered, it will be binding on a purchaser of a mere equitable interest in the burdened land, and a purchaser of the legal estate who does not give money or money's worth. (*Ibid.* s. 13(2) proviso).

(f) L.P.A., 1925, s. 79.

*Conditions
for burden
to run*

1345. The burden of the restrictive covenant will run with the land, as above, provided, (1) it is negative and restrictive of the use of the covenantor's land;^(a) (2) the covenant must have the object of benefiting land of the covenantee and retained by him, and capable of being identified, after the date of the covenant;^(b) (3) the covenant must show an intention that the burden is attached to the covenantor's land;^(c) and (4) at the time of the breach, the land benefited must be vested in the person seeking to enforce the covenant ^(d).

- (a) The covenant must be negative in substance, although the wording may be positive or negative. It must not require anything to be done on the land, and it must not involve the expenditure of money (*Zealand (Marquess) v. Driver*, [1939] Ch. 1 at p. 8).
- (b) A restrictive covenant resembles an equitable easement and the burden will only run with the land if the covenant was made for the protection of definite land retained by the covenantee. (*Formby v. Barker*, [1903] 2 Ch. 539; *L.C.C. v. Allen*, [1914] 3 K.B. 642; *Chambers v. Randall*, [1923] 1 Ch. 149). Under the Town and Country Planning Act, 1932, s. 34, and the Housing Act, 1936, s. 148, the covenant may be enforced although no adjoining land is retained.
- (c) This is a question of construction. (Cf. *Rogers v. Hosegood*, *supra*; *Reid v. Bickerstaff*, [1908] 2 Ch. 305; *Willé v. St. John*, [1910] 1 Ch. 325; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150.) See L.P.A., 1925, s. 79.
- (d) *Formby v. Barker*, *supra*, *Kelly v. Barrett*, [1924] 2 Ch. 379.

1346. The Court will presume an intention that covenants of the kind described in § 1343, being restrictive, shall run with the land, from the existence of a "building scheme". To establish the existence of a building scheme, it must be proved—

- (i) that the plaintiff and defendant acquired from a common vendor ;
- (ii) that such vendor, prior to the sale to either party or his predecessor in title, laid out land, including the land of both parties, under a scheme intended to affect both ;
- (iii) that such scheme was intended for the benefit of purchasers of all lots sold ;
- (iv) that both parties, or their predecessors in title, purchased on that footing,^(a) and the area to which the scheme applies must be clearly defined.^(b)

- (a) *Elliston v. Reacher*, [1908] 2 Ch. at p. 384, *per* PARKER J., approved by C.A., *ibid.* 665. In *White v. Bijou Mansions, Ltd.*, [1938] Ch. at pp. 360-363, GREENE, M.R., calls attention to a fourth class of case in which the owner of land is entitled to enforce a restrictive covenant, namely, where from the similarity of the covenants entered into by the purchasers mutual rights and

obligations are inferred, although some of the essentials of a building scheme are absent.

- (b) *Kelly v. Barrett*, [1924] 2 Ch. 379 at p. 401, *Lawrence v. South County Freeholds, Ltd.*, [1939] Ch. 656.

Contracts

1347. When the existence of a building scheme is established, a contract not to deal with any portion of the land included in the scheme (including plots not sold) in a manner inconsistent with the scheme, will be implied ; and such contract will be enforceable and binding, in the same manner and to the same extent, as a restrictive covenant to that effect.

Mackenzie v. Childers (1889), 43 Ch. D. 265.

Elliston v. Reacher, *ubi supra*.

Semble : it may bind the vendor as to sales of adjoining land, unless there is express provision to the contrary (*Osborne v. Bradley*, [1903] 2 Ch. at p. 453),

Inconsistent conduct

1348. Conduct on the part of the plaintiff inconsistent with the observance of the covenant,^(a) or acquiescing in the breach of the covenant,^(b) in such circumstances that a reasonable person would believe the covenant no longer applies or a complete change on the character of the neighbourhood will deprive him of his equitable remedy.

- (a) *Bedford (Duke) v. British Museum Trustees* (1822), 2 My. & K. 552.
Chatsworth Estates Co. v. Fewell, [1931] 1 Ch. 224, 231.

- (b) *Sayers v. Collyer* (1884), 28 Ch. D. 103.

Power to modify scheme

1349. The Authority, that is, an official arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, may, on the application of anyone having a freehold interest in the land^(a) affected by any restriction as to the user of such land or the building thereon, by order wholly or partially discharge or modify any such restriction, subject or not to the payment of compensation to any person actually suffering a loss in consequence of the order. But such order may only be made on one of the following grounds :—

- (i) change in the character of the property or the neighbourhood ;
- (ii) the acquiescence, express or implied, of all the beneficiaries, being of full age and capacity, in the discharge or modification of the restriction ;
- (iii) that such discharge will not injure the beneficiaries of the restriction.^(b)

(a) This is a paraphrase of the words " interested in any freehold land ".

(b) L.P.A., 1925, s. 84. *Re Henderson's Conveyance*, [1940] Ch. 835.
The section was not designed to enable a person to expropriate the private rights of another for his own profit.

By sub-s. (12) a term of seventy years, whether created before or after 1st January, 1926, may be the subject of the provisions of the section if (1) fifty years have already elapsed, (2) it is not a term created by a mining lease. The statutory provisions apply to restrictive covenants whenever made, but do not apply to restrictions imposed on a disposition made gratuitously or for a nominal consideration for public purposes. By sub-s. (2) power is given to the Court on the application of any person interested to declare whether the land is affected by any restriction, and if so, the nature, extent and enforceability of it. There is no power under this head to modify or discharge a valid restrictive covenant.

1350. Covenants restricting the user of land are *Not a perpetuity* not void for perpetuity ; even though no limits of *petuity* time are fixed for their operation.

Keppell v. Bailey (1834), 2 My. & K. at p. 527, *per* Lord BROUGHAM, C.

Mackenzie v. Childers (1889), 43 Ch. D. 265. *Zetland (Marquess) v.*

Driever, [1939] Ch. 1 at p. 9.

The reason is, that such covenants do not create future interests, but only impose restrictions on existing interests.

1351. A defendant who has acquired land on *Acts of predecessor* which a previous owner has erected a building in breach of a covenant such as that described in § 1344, is not liable to a mandatory order requiring him to remove it.

Powell v. Hemsley, [1909] 2 Ch. 252.

This case was very strong ; because the defendant was himself the original covenantor. It seems to indicate an easy method of escape from the doctrine of *Tulk v. Moxhay*, when the restrictive covenant merely forbids the doing of a single act.

SECTION V

VOLUNTARY ALIENATION OF LAND

TITLE I—ABSOLUTE CONVEYANCE INTER VIVOS

Form

1352. Subject to § 1354, a conveyance *inter vivos* (including a lease) of the legal title to an interest in land can only be made by deed (§ 1353) or (in the case of registered land) by registered transfer ;^(a) and a conveyance of land (including a declaration of trust) binding in equity (other than a lease at will) can only be made by writing signed by the conveying party or his agent thereunto lawfully authorized by writing.^(b) Conveyances of land by word of mouth ("parol") convey only interests at will.^(c)

(a) L.P.A., 1925, ss. 52 (1), 205 (1) (x). Land Registration Act, 1925, s. 18.

(b) *Ibid.* s. 53.

(c) *Ibid.* s. 54.

The disposition of an existing trust interest applies to all kinds of property.

Deed

1353. A deed is a document, written or printed, or partly written and partly printed, on paper or parchment, signed, sealed, and delivered (subject to § 1366) by all persons intended to be bound by it.

L.P.A., 1925, s. 73 (1).

This provision applies only to deeds executed after 1925 (*ibid.* (2)). Before 1926 it was doubtful whether signature was necessary. Inasmuch as, in practice, a seal had long ceased to be more than a pure (though technically important) formality, the doubt about the necessity of signature was serious ; and it is remarkable that it was allowed to exist so long. With regard to the purely theoretical value of the seal under modern conditions (but perhaps rather in contracts than conveyances) see the remarks of GODDARD, J., in his Memorandum

attached to the Sixth Interim Report of the Law Revision Committee (1937, Cmd. 5449, pp. 35-36.).

1354. A lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term, at the best rent that can reasonably be obtained without taking a fine, may be made by word of mouth, or by writing under hand only ("parol"), or by deed ("seal") and may create a legal estate. *Short leases*

L.P.A., 1925, s. 54 (2).

A term does not exceed three years if at the time of the agreement it may last for less than that period, although it may last for more (*Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442 at p. 458.). The three years are computed from the day of the making of the lease, and if the term does not commence at once (*Ryley v. Hicks* (1725), 1 Stra. 651) it must expire, or be capable of expiring, within three years from that day (*Foster v. Reeves*, [1892] 2 Q.B. 255 per Lord Esher, M.R. at p. 257).

1355. A conveyance on sale of a freehold interest in unregistered land situate within an area in which registration of title is compulsory on sale does not pass the legal estate, unless and until the person in whose favour it is made is registered as proprietor. *Compulsory registration*

Land Registration Act, 1925, s. 123.

Up to the end of 1946, the only areas in which registration is compulsory on sale of land are the administrative County of London, the county boroughs of Eastbourne, Hastings and Croydon and the County of Middlesex. The definition of "sale" in the Land Registration Act (s. 123) is important. See Note on Registration of Title *post*, pp. 708-713.

1356. A conveyance by non-registered deed of an interest in registered land, situate within an area in which registration is compulsory on sale, will not be effective to convey the legal title. *Non-registered conveyance*

Capital and Counties Bank, Ltd. v. Rhodes, [1903] 1 Ch. 631.

L.R.A., 1925, ss. 69 (4), 19 (1), 21 (1) overruling to this extent *Capital and Counties Bank, Ltd. v. Rhodes*.

Registered land may be dealt with by an unregistered assurance, but confers on the grantee only a minor interest which may be overridden by a subsequent registered transfer for value, but may be protected by notice, caution, or inhibition as provided by the Act (L.R.A., ss. 101, 49, 54, 55).

*Covenants
for title*

1357. A person who, in a conveyance entered into after 1881, other than a lease at a rent, is expressed to convey as “beneficial owner”, “settlor”, “trustee”, or “mortgagee”, is deemed, in the absence of and subject to the express terms of the conveyance, to have entered into covenants for title in accordance with the provisions of Schedule II of the L.P.A., 1925, on the interpretation to be attributed to those terms respectively.

L.P.A., 1925, ss. 76, 77.

Owing to the complication of the English land law, it sometimes happens that a person conveying land is unable to convey what he has contracted to convey. The buyer may get a bad title and lose the land, and he has no remedy against the seller, unless he can establish fraud. To meet this difficulty conveyancers inserted covenants for title in conveyances, and if any defect in title was afterwards discovered, the person conveying could be sued for damages for breach of the covenants. Before the Conveyancing Act, 1881, it was the practice of the conveying party to set out the covenants at length in the conveyance and they were almost always in the same form, but with the object of shortening conveyances, sec. 7 of that Act, provided that the usual covenants for title should be implied in deeds when certain expressions were used. The L.P.A., 1925, s. 76, re-enacts and extends s. 7 of the Act of 1881, and provides that where in a conveyance for valuable consideration executed after 1881, a person conveys and is expressed to convey “as beneficial owner”, the following covenants for title are implied :

(i) Good right to convey ; that the seller has power to convey the land to the extent of the interest which he has agreed to sell (*Eastwood v. Ashton*, [1915] A.C. 900).

(ii) Quiet enjoyment. A breach of this covenant would also amount to a breach of the covenant for a good right to convey, but it has this advantage, that an action on the covenant for quiet enjoyment is not barred until twelve years after the interference with possession, whereas an action on the covenant for a good right to convey is barred after twelve years from the execution of the conveyance (Limitation Act, 1939). It should be noted that on a grant

(creation) of a lease (as distinct from an assignment, i.e. transfer of an existing lease) the words "as beneficial owner" are not used by the lessor, and even if they were, no covenants for title would be implied (§ 1087 *ante*).

(iii) Freedom from incumbrances except those subject to which the conveyance was expressed to be made.

(iv) Further assurance; that the vendor will execute such assurances and do all things necessary to perfect the title of the purchaser, at the purchaser's expense.

On an assignment (sale) of leaseholds, the following additional covenants are implied;

(v) That the lease is valid and subsisting.

(vi) That the rent has been paid and the covenants in the lease duly performed up to the date of the assignment.

In any conveyance, whether voluntary or for valuable consideration, made by a person who conveys, and is expressed to convey "as settlor", the only covenant implied is one for further assurance, binding that person and those claiming under him. Where a person is expressed to convey "as trustee", or "as mortgagee", or "as personal representative", or "as committee", or "as receiver", or "under an order of the Court", the only covenant implied is that he himself has done nothing to incumber the estate. This covenant is implied in any conveyance, whether on sale or not.

The covenants implied by conveying "as beneficial owner" are not absolute but qualified. They only apply to a conveyance for valuable consideration. The vendor is only responsible for a defect in title if due to his own acts or omissions, or those of persons claiming under him, or those of persons through whom he claims otherwise than by purchase for value—not including in that expression a conveyance in consideration of marriage. For example, A, the owner of Blackacre, granted a legal easement over Blackacre to B, and later, sold and conveyed Blackacre "as beneficial owner" to C. Later C sold and conveyed Blackacre "as beneficial owner" to D. If B exercises his easement, and disturbs D's quiet enjoyment, D cannot sue C on the implied covenant for quiet enjoyment, because B does not claim under C, but under A. C is not responsible for B's acts or omissions because he purchased for value from A (*David v. Sabin*, [1893] 1 Ch. 523. *Stoney v. Eastbourne R.D.C.*, [1927] 1 Ch. 367).

The benefit of the implied covenants for title runs with the land, and can be enforced by every person in whom the covenantee's estate or interest or any part thereof is for the time being vested. Thus in the example above, D can sue A, who conveyed to C as beneficial owner, because B did claim under A, and the benefit of A's covenants runs with the land. When a person creates a mortgage "as beneficial owner", the implied covenants for title are absolute; he is responsible for the acts or omissions of anyone who has a lawful

claim to the property. If the property mortgaged is leasehold, there are further implied covenants, (i) that the lease is valid, (ii) that the rent has been and will be paid, (iii) that covenants have been and will be performed, so long as any money remains owing on the mortgage. It should be noted that the covenants are only implied when the mortgagor is expressed to convey "as beneficial owner"—not "as mortgagor". The expression "as beneficial owner" implies no covenants at all in a voluntary conveyance. Finally, the liability on the covenants implied by using expressions other than "as beneficial owner", e.g. "as trustee" etc., is, as pointed out above, limited to the grantor's own acts.

It will be observed by the student of the above-mentioned sections and Schedule that there is no direct restriction of their operation to conveyances of land; though there are slight indications that this was intended by Parliament. Covenants for title are covenants intended to secure the acquirer of the interest conveyed against defects in the title of the conveying party or parties, from which he (the acquirer) may suffer loss. Cf. Sale of Goods Act, 1893, s. 12.

Estoppel by deed

1358. A conveyance by deed works an "estoppel", i.e. it prevents any party to it,^(a) and any person subsequently claiming through such party,^(b) denying, in any proceedings on such deed,^(c) as against any person entitled to rely on such statement,^(d) the truth of any clear and explicit statement,^(e) contained in such conveyance, of material fact,^(f) with regard to his title. And if such statement was in fact not true at the time when it was made, but the person making it (? or any person claiming through him), subsequently acquires property the ownership of which would have justified such statement, such property passes by operation of law to the person or persons entitled to rely on such statement ("feeding the estoppel").^(g)

(a) *Fairtitle d. Mytton v. Gilbert* (1787), 2 Term Rep. at p. 171, per ASHURST, J.

Doe d. Roberts v. Roberts (1819), 2 B. & Ald. 367.

Phillpotts v. Phillpotts (1850), 10 C.B. 85.

It is a question of construction which of the parties to the deed are parties to any statement in it (*Stroughill v. Buck* (1850), 14 Q.B. 781).

(b) *Doe d. Leeming v. Skirrow* (1837), 7 Ad. & El. 157.

Doe d. Gaisford v. Stone (1846), 3 C.B. 176.

Dalton v. Fitzgerald, [1897] 2 Ch. 86.

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- (c) *Carpenter v. Buller* (1841), 8 M. & W. 209.
Carier v. Carier (1857), 3 K. & J. 617 at p. 645, *per* Wood, V.C.
Fraser v. Pendlebury (1861), 31 L.J.C.P. 1.
- (d) Generally speaking, only parties to the deed, and persons claiming through them ("privies in blood or estate"), can set up the doctrine of estoppel (*Trinidad Asphalt Co. v. Coryat*, [1896] A.C. 587). But there appears to be little authority on the point. As to who are "privies in blood", see *Weeks v. Birch* (1893), 69 L.T. 759.
- (e) *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278.
Heath v. Crealock (1874), 10 Ch. App. 22.
General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society (1878), 10 Ch. D. 15.
Onward Buildg. Socy. v. Smithson, [1893] 1 Ch. 1.

E.g. the mere grant of an estate, even if accompanied by covenants for title, does not amount to such a statement. And the grantor or those claiming under him will not be estopped from denying that he had a title to the legal estate at the date of the grant (*General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Socy.*, *ubi supra*).

- (f) The rule has no application to erroneous statements of law (*Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70).
- (g) *Rawlins' Case* (1587), 4 Co. Rep. 52 a.
Style v. Hearing (1605), Cro. Jac. 73.
Edwards v. Omellhallum (1639), March, 64.
Doe d. Christmas v. Oliver (1829), 5 Man. & Ry. (K.B.) 202.

The doctrine of estoppel applies to incorporeal as well as corporeal hereditaments (*Poulton v. Moore*, [1915] 1 K.B. 400).

1359. A conveyance by deed takes effect from *Delivery of deed* the delivery thereof.

- Willis v. Jermin* (1590), Cro. Eliz. 167.
- Sryles v. Wardle* (1825), 4 B. & C. at p. 911, *per* BATLEY, J.
- Tupper v. Foulkes* (1861), 9 C.B.N.S. 797.

As to what constitutes "delivery" see *ante*, § 127. "Anything to show that he treated the deed as his deed is enough" (*Tupper v. Foulkes*, *ubi supra* at p. 809, *per* WILLIAMS, J.).

1360. No one can be compelled to accept a conveyance by deed.^(a) *Disclaimer* But a conveyance of land by deed at once vests the land in the grantee; even if he is unaware of its existence. The grantee may, however, on becoming aware of the conveyance, disclaim; in which case the land will be deemed never to have vested in him.^(b)

- (a) *Townson v. Tickell* (1819), 3 B. & Ald. 31.
- (b) *Butler v. Baker* (1591), 3 Co. Rep. at p. 26 b, *per Curiam*.
Smyth v. Wheeler (1671), 2 Keb. 772.
Leech's Case (1692), Carth. 250.
Doe d. Garmons v. Knight (1826), 5 B. & C. 671.
Mallott v. Wilson, [1903] 2 Ch. 494.

Even the fact that the conveying party retains the conveyance in his own hands will not prevent the operation of the rule ; if it is clear that he intended the conveyance to be effectual (*Doe d. Garmons v. Knight*, *ubi supra*, at p. 692, *per Curiam*). And even a formal disclaimer only revests the interest of the disclaiming party, not any trusts limited out of it (*Mallott v. Wilson*, *ubi supra*). It was said in *Butler v. Baker*, *ubi supra*, that a freehold could not be divested by a mere oral disclaimer *in pais*, i.e. without deed or record. But see the contrary decided in the modern case of *Re Birchall, Birchall v. Ashton* (1889), 40 Ch. D. 436, 439, which was, however, a case of devise.

*Gift to
stranger*

1361. An immediate or other interest in land or other property may be taken under an instrument executed after 1st October 1845, by a person not named as a party thereto.

L.P.A., 1925, s. 56 (1).

Before the passing of the Real Property Act, 1845, a person not a party thereto could take an interest under a " deed poll ", i.e. a deed not professed to be made *inter partes* (2 Inst. 673). But a stranger could not take an immediate interest under an indenture purporting to be made *inter partes*. The technical peculiarities of an " indenture " are abolished by the L.P.A., 1925, s. 56 (2). It will be observed that the Act applies in this section, not only to land, but to all kinds of property. *Supra* § 1340 n.

*Presumption
in favour of
grantee*

1362. A conveyance by deed is construed, so far as the words used will reasonably admit, in favour of the grantee and against the grantor.^(a) The same rule applies to an exception by the grantor out of the property conveyed to the grantee.^(b)

- (a) Co. Litt. 42, 183.

Willion v. Berkley (1561), 1 Plowd., at fo. 243 a, *per* WESTON, J.
Re Stroud (1849), 8 C.B. at p. 529, *per* WILDE, C.J.

- (b) *Bullen v. Denning* (1826), 5 B. & C. 842 at p. 847.

Savill Bros., Ltd. v. Bethell, [1902] 2 Ch. 523 at p. 537.

There is a well-known exception from this rule in the case of a grant by the Crown (*Willion v. Berkley*, *ubi supra*). And sometimes

the statement of the rule is qualified by limiting it to conveyances for valuable consideration (*Neill v. Devonshire (Duke)* (1882), 8 App. Cas. at p. 149, *per* Lord SELBORNE, C.).

1363. An exchange or other conveyance of land made by deed after 1st October, 1845, does not imply any condition in law (§ 107 *ante*); and the use of the words "give" or "grant" in a deed made after that date does not imply any covenant (in law),^(a) save where otherwise provided by statute.^(b) *Implied conditions and covenants*

(a) L.P.A., 1925, s. 59.

Before 1845, an exchange of lands implied mutual conditions as to title; and there was a theory (not undisputed) that the use of the words "give" or "grant" in a deed conveying land implied covenants for title. For "covenant in law" see Co. Litt. 384a Butler's note and *Williams v. Burrell* (1845), 1 C.B. at p. 429 *per Curiam*.

(b) E.g. the Lands Clauses Act, 1845, s. 132.

1364. A conveyance of the legal estate in land is effectual, without valuable consideration, to pass also the beneficial interest, even to a stranger, in the absence of expression to the contrary. *Voluntary conveyances*

Villers v. Beaumont (1682), 1 Vern. 100, *per* Lord NOTTINGHAM, C.

Lloyd and Jobson v. Spillet (1741), 2 Atk. 148.

Young v. Peachy (1742), *ibid.* at p. 256, *per* Lord HARDWICKE, C.

Fowkes v. Pascoe (1875), 10 Ch. App. at p. 348, *per* JAMES, L.J.

Prior to 1926, if a conveyance of a fee simple contained no apparent consideration and no declaration to whose use it was made, the use, and with it, the legal estate in fee simple resulted to the transferor (*Beckwith's Case*, *Colgate v. Blithe* (1589), 2 Co. Rep. 56b, 58; *Armstrong d. Neve v. Woolsey* (1755), 2 Wils. 19). The opinions of judges and text writers have differed on this point, and the contrary view is expressed in (*Lloyd and Jobson v. Spillet* (1741), 2 Atk. 148, 150; *Young v. Peachy*, *ibid.* 254, 256). The Statute of Uses has now been repealed (L.P.A., 1925, s. 207, Sched. VII), and in a voluntary conveyance made after 1925, a resulting trust for the grantor is not to be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee (*ibid.* s. 60 (3)). Of course, absence of consideration may be evidence of fraud; but fraud is never presumed. Equally of course, a voluntary conveyance may be invalid because it tends to defeat or delay creditors (*post*, § 1658).

*Not revoc-
able*

1365. Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of such purchaser. But no voluntary disposition, whenever made, will be deemed to have been made with intent to defraud, by reason only that a subsequent conveyance for valuable consideration was made (*semble*, of the same land), if such subsequent conveyance was made after the 28th June, 1893.

L.P.A., 1925, s. 173.

This somewhat mysterious provision was rendered necessary by the fact that a perverse interpretation of the 27 Eliz. (1585), c. 4, s. 4, laid it down, that the mere fact that a voluntary conveyance followed by a conveyance for value of the same land by the same grantor to a third party, avoided the voluntary conveyance. This interpretation was abolished by the Voluntary Conveyances Act, 1893.

*"Reserva-
tion"*

1366. A conveyance of land may be made, by way of reservation to the grantor by deed of a legal estate in land, without any execution, by the grantee of the legal estate, of the conveyance by which the legal estate out of which the reservation is made was conveyed to him, or any re-grant by him.

L.P.A., 1925, s. 65 (1).

Before 1926, a "reservation" was, in a properly drawn conveyance, effected by way of use, which operated, under the Statute of Uses, to vest the reserved estate in the grantor. The Statute of Uses having been repealed by the L.P.A., 1925, Sched. VII, it became necessary to anticipate technical objections. A conveyance of a legal estate "subject to" a non-existing estate, will operate as a reservation (*semble* to the conveying party) (L.P.A., 1925, s. 65 (2)).

NOTE ON REGISTRATION OF TITLE.

The system of voluntary registration of title in England and Wales was inaugurated by the Land Registry Act, 1862, and the Land Transfer Act, 1875. The system developed when the Land Transfer Act, 1897, made registration of title compulsory on dealings with land in the County of London. Further extension has been made by the Land Registration Acts of 1925 and 1936 and the rules made under the Acts known as the Land Registration Rules, 1925. To-day registration of title is compulsory in the administrative county of

London, the county boroughs of Eastbourne, Hastings and Croydon and in the County of Middlesex. The title to any land in England and Wales may be registered, but only in the above areas is it compulsory, though it may be compulsorily extended to any county by Order in Council. Even within these compulsory areas, registration is only compulsory on a conveyance on sale of the legal fee simple or the creation or transfer of a lease having at least forty years to run. Where registration is compulsory, no legal estate will pass unless registration is applied for within two months of the transfer. Outside the compulsory areas, registration is optional. The main objects of land registration under the Land Registration Act, 1925, are (i) to facilitate and cheapen the investigation of title, (ii) facilitate dealings with land subject to equities, (iii) to provide simple methods of effecting transfers and charges, and (iv) to give a State guarantee of title to purchasers and mortgagees of registered land. The system differs from registration of incumbrances (§§ 1293 n, 1403, 1404), and from the registration of deeds, in that one final and authoritative examination of the whole title is made by the State, i.e. the Registrar, and when the title is entered on the Register the State guarantees the title is good against the whole world, subject to such mortgages and other burdens as are set out on the Register. It dispenses with the repeated investigation of title deeds on each disposition of the land. The registered proprietor is given a land certificate containing a facsimile of the register, and of the plan identifying the land, and this takes the place of the title deeds. On a sale of registered land there is no need to examine the title deeds for the last thirty years or more; the purchaser examines the register to see that the vendor is the registered proprietor, and to what third party rights the land is subject; the transfer is made in a short and simple form.

The Register consists of three parts:

1. *The Property Register* contains a description of the land, giving the parish, the name of the house or estate, and identifying it by reference to a plan or map.

2. *The Proprietorship Register* which states the nature of the title registered, i.e. whether it is absolute, good, leasehold or possessory, and gives the name, address and description of the registered proprietor. It sets out any restrictions on the registered proprietor's powers of dealing with the land, and any cautions requiring notice to be served on any other person before the transaction can be completed by registration.

3. *The Charges Register* contains entries of rights adverse to the land, such as mortgages, charges and incumbrances. Each register has a blank space for subsequent dealings.

After 1925 only those interests in land capable of subsisting as legal estates—a fee simple absolute in possession and a term of years absolute—may be the subject of registered titles (L.R.A., s. 2 (1)).

But a lease for a term not exceeding twenty-one years, or which contains an absolute prohibition against assignment, or is a mortgage term with a right of redemption still subsisting cannot be registered. There are four types of title, of various degrees of conclusiveness for which an applicant can be registered, and all types are applicable to leasehold, but of course, the second is not applicable to freehold.

1. *Absolute*. This, in the case of freeholds, vests in the first registered proprietor the fee simple in possession subject to :

- (i) incumbrances and other entries on the register ;
- (ii) overriding interests if any, unless the contrary is expressed on the register ;
- (iii) minor interests of which he has notice where the applicant for first registration is not entitled to the land for his own benefit ; e.g. where trustees holding land on trust for sale are registered as proprietors, they hold subject to the interests of the beneficiaries.

In the case of leaseholds ; the title is subject to all the above, and

- (iv) all implied and express covenants, obligations and liabilities of the lease,

but free from all other estates and interests whatsoever.

2. *Good Leasehold*. This is the same as an Absolute Title, save that it does not guarantee the lessor's title to grant the lease.

3. *Possessory Title*. First registration, in the case of freeholds and leaseholds with a possessory title has the same effect as registration with an absolute title, save that the title is subject to any estate, right or interest adverse to or in derogation of the title of the first proprietor and subsisting or capable of arising at the time of registration. The register does not guarantee that a person registered with a possessory title has any title at all, and a purchaser from him must investigate the title in the ordinary way down to the date of registration.

4. *Qualified Title*. This confers on the registered proprietor the same rights as an Absolute or good leasehold title apart from anything either, (i) arising before a specified date, or (ii) arising under a specified instrument or otherwise particularly described in the Register. It is an absolute title subject to specified flaws and is very uncommon. Application can be made for any of the above titles, but not for a qualified title in the first instance.

When registration has taken place with any of the above titles, conversion may take place subsequently into a more conclusive title.

Overriding Interests. These are interests in the land which are enforceable against the registered proprietor even though no mention of them is made on the register and even though he has no knowledge of them. They override the register. The Land Registration Act, 1925, s. 70, contains a list of them. Most, but not all of them are legal

rights. Many of them are rights which may be ascertained by inspection of the land, e.g. rights of way, light drainage, and other easements, *profits à prendre* ; or by enquiry of the occupier, e.g. leases not exceeding twenty-one years granted at a rent without taking a fine. Others are rights arising under Acts of Parliament affecting land generally, e.g. land tax, tithe redemption annuities ; rights acquired or in the course of being acquired under the Limitation Act, 1939 ; rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry of such person fails to disclose the rights, rights under local land charges until protected by entry on the Register.

Minor Interests. These are defined in the Land Registration Act, 1925, s. 3 (xv), and cover interests which are neither capable of registration nor are overriding interests and have to be protected by some entry on the register. They are of two main kinds, (i) those which would not bind a purchaser under the general law and are capable of being overreached by a registered disposition even when protected by entry on the register, e.g. the equitable interests of the beneficiaries under a trust for sale or settlement of land, (ii) those binding on a purchaser if they are properly protected, e.g. a restrictive covenant.

Minor interests may be protected by notice, caution, restriction or inhibition. A notice is a direct entry of the right of the owner of a minor interest, such as all land charges under the Land Charges Act, 1925, and legal rent charges, which is noted on the register, and all subsequent dealings by the registered proprietor take effect subject to the right protected. A caution simply warns an intending purchaser that a third party claims rights in the registered land, and the cautioner must be informed by the registrar of any proposed dealing. The cautioner must show cause for his objection to the dealing, usually within fourteen days. A restriction is an entry on the register made on the application of the registered proprietor himself which prevents any dealing with the land until some condition stated in the restriction has been complied with. Where the registered proprietor is the tenant for life of settled land, a restriction must be entered prohibiting the registration of a disposition not authorised by the Settled Land Act, 1925, and to the effect that capital money must be paid to named persons. An inhibition is an unusual form of protection except in the case of bankruptcy. It can only be entered on the Register by order of the registrar or of the Court and prohibits any dealings with the land, either absolutely or for a specified time.

A contrast may now be made between the sale of unregistered and that of registered land. On the sale of unregistered land a formal and somewhat complicated contract of sale is drawn up. The vendor's solicitor then prepares an abstract of title—a summary of every material clause, copies of plans in the deeds, all deaths, marriages, bankruptcies, orders of the Court etc., affecting the title of the land

during the prescribed period. The abstract of title is examined by the purchaser's solicitor and compared with the original deeds and documents, and he makes requisitions to the vendor's solicitor to clear up doubtful points. He then searches in the Land Charges Registers and in any relevant Local Land Charges Register. The purchaser's solicitor prepares a conveyance subject to the approval of the vendor's solicitor, and on payment of the purchase money he secures the conveyance and such prior deeds and documents of title as the vendor is obliged to hand over to him. On a sale of registered land the proof of title is much easier, and it is a State guaranteed title. No abstract of title as such is considered, there is no need to see the original deeds, and there is no difficulty about the identity of the land. The register is private and can only be inspected by authority of the registered proprietor or his solicitor. After the contract of sale, the vendor is bound to give this authority to enable the purchaser to verify the copy of the entries on the register which the vendor is bound to supply together with any title to overriding interests in lieu of an abstract of title. Normally the land certificate contains all the matters relating to the title required by the purchaser, hence the practice is to give a copy of the land certificate to the purchaser. If the purchaser obtains an official search he is not affected by entries on the register made between the date of the certificate of search and his application for registration, provided the application is delivered in proper form at the Registry before it opens or is deemed to open on the fifteenth day after the date of the certificate. The purchaser then prepares the prescribed simple form of transfer. On completion, the vendor in exchange for the purchase money, hands over the land certificate to the purchaser, who forwards the transfer and the land certificate to the Registrar. The Registrar makes the necessary entries on the register and the land certificate, and returns the latter to the purchaser—the new registered proprietor. The purchaser takes the land subject to all interests which bound the vendor, but if he is a purchaser for value, he takes free from minor interests other than those which are binding on him through their being protected by an entry on the register. For details of other transfers of registered land, the reader must consult the standard works on Conveyancing.

NOTE ON REGISTRATION OF DEEDS

The registration of incumbrances affecting land under the Land Charges Act, 1925, is outlined in §§ 1293 n, 1403 and 1404 n. Another type of registration is that of documents dealing with land, which now only applies to land in Yorkshire (Yorkshire Registries Acts, 1884, 1885, as amended by L.P.A., 1925, ss. 11, 197, and Land Charges Act, 1925, s. 10). A memorial must be registered of any assurance of land in Yorkshire which creates or transfers a legal estate or creates a charge by way of legal mortgage, such as a convey-

ance on sale, probates, an assent by a personal representative, leases for over twenty-one years. The State takes no responsibility for the subject matter of the documents, it does not guarantee that such documents as are registered are valid, but simply provides that when they are not registered they are void against subsequent purchasers. The object is to simplify the task of the purchaser in verifying his title, and to prevent the duplication, or alteration or suppression of deeds. General equitable charges, restrictive covenants, equitable easements and estate contracts affecting land in Yorkshire are not registrable in the Land Charges Register, but in the Yorkshire Registry in order to bind purchasers.

All assurances registrable under the Yorkshire Registries Act have priority according to the date of registration, except that if probate is registered within six months of the death, it has priority according to the date of the testator's death. The general effect of non-registration is to make the assurance void against a subsequent purchaser for value even if he had notice actual or constructive of the unregistered assurance, unless he was guilty of fraud.

Prior to 1937 a similar system of registration of documents existed in Middlesex, but the Middlesex Deeds Registry was closed pursuant to the Land Registration Act, 1936, and registration of title to land in Middlesex became compulsory after 1936. (See also Middlesex Deeds Act, 1940.)

TITLE II—CONVEYANCE BY WAY OF MORTGAGE

*Mortgages
cannot be
irredeemable*

1367. Any conveyance having for its object to secure the payment of money is a mortgage, whatever it may be called.^(a) Subject to § 1579 *post*, a mortgage cannot be made irredeemable.^(b)

(a) *Newcomb v. Bonham* (1681), 1 Vern. 7 (sale with option of repurchase).

Fawcett v. Bowers (1693), 2 Vern. 287 (grant of rent).

James v. Oades (1700), 2 Vern. 402 (do.).

Re Alison, Johnson v. Mounsey (1879), 11 Ch. D. 284 (trust for sale).

Salt v. Northampton (Marquess), [1892] A.C. 1 (effecting life insurance).

Santley v. Wilde, [1899] 2 Ch. 474, *per* LINDLEY, M.R.

(b) *Newcomb v. Bonham*, *ubi supra*.

Howard v. Harris (1683), 1 Vern. 190.

Fairclough v. Swan Brewery Co., Ltd., [1912] A.C. 565.

The rule applies to every kind of property.

*Form of
legal mort-
gages*

1368. A legal mortgage of an estate in fee simple can only be effected either by a demise for a term of years absolute, subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage.^(a) A legal mortgage of a term of years absolute (in land) can only be effected either by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor (at the date of the mortgage), and subject to a provision for cesser on redemption, or by a deed expressed to be by way of legal mortgage.^(b) Where a licence to sub-demise by way of mortgage is required (in the lease creating the term) such licence shall not be unreasonably refused.^(c) A first mortgagee, in either case, has the same right to the possession of documents as if his security had included the fee simple or the whole term absolute, as the case may be.^(d)

(a) L.P.A., 1925, s. 85 (1). (An attempt to convey the whole of the

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mortgagor's estate creates a term of 3,000 years from the date of the mortgage (*ibid.* (2)).)

(b) *Ibid.* s. 86 (1). (A similar attempt to convey the whole term creates a term less by 10 days than the term attempted to be mortgaged (*ibid.* (2)).)

(c) *Ibid.* s. 86 (1).

(d) *Ibid.* ss. 85, 86.

The words in brackets in the text are not in the Act ; but it is submitted that they are implied.

1369. A charge by deed expressed to be by way of legal mortgage of land confers upon the mortgagee the same protection, powers, and remedies, including the right to possession and receipt of rents of the land, as though a corresponding term or sub-term of years had been created in his favour (by a formal mortgage). *Mortgage by charge*

L.P.A., 1925, s. 87. (The term (but not the sub-term) is without impeachment of waste (*ibid.* (1) (a)).)

It is submitted that the words in brackets must be implied, or the mortgagee would be able to ignore the right of redemption. The advantages of a legal charge are, (i) the form is short and simple, (ii) it is a convenient way of mortgaging freeholds and leaseholds together, (iii) it probably does not amount to a breach of a covenant in a lease against sub-letting for the charge does not create a sub-term.

1370. An equitable mortgage of land may be made by an instrument in writing purporting to convey only an equitable interest,^(a) by written memorandum or charge,^(b) or by deposit of title deeds^(c) (including land certificate).^(d) *Equitable mortgages*

(a) L.P.A., 1925, s. 53 (1) (c).

(b) The advantage of this method is that the stamp duty is lower than on a mortgage by deed. But the mortgagee cannot exercise statutory powers of enforcement of the mortgage.

(c) L.P.A., s. 2 (3) (1).

(d) Land Registration Act, 1925, s. 66.

1371. Generally, the priority of mortgages, whether legal or equitable, affecting a legal estate in and when not protected by deposit of the title deeds relating to the legal estate affected, is governed by the order of registration.^(a) The priority of mortgages of an equitable interest in any property is *Priorities*

governed by the order in which written notice is given to the trustees.^(b)

(a) L.P.A., 1925, ss. 97, 198, 199. L.C.A., 1925, ss. 10, 13, 20.

(b) L.P.A., 1925, ss. 137, 138.

Before 1926 the priority of mortgages affecting land was governed by two rules; "*Qui prior est tempore potior est in jure*"—the first created was first paid; "Where the equities are equal the law prevails"—a legal mortgage had priority over an equitable one where they had equal claims to be preferred. It was possible, but very unusual, to have more than one legal mortgage, and where a legal mortgage was followed by an equitable mortgage, the legal mortgagee came first unless he had been guilty of fraud or gross negligence such as failure to obtain or retain the title deeds (*Northern Counties of England Fire Insurance Co. v. Whipp* (1884), 26 Ch. D. 482 (*Grierson v. National Provincial Bank of England, Ltd.*, [1913] 2 Ch. 18). Where an equitable mortgage was followed by a legal one, the legal mortgagee came first unless he had notice actual or constructive of the equitable mortgage, e.g. when he failed to inquire for the title deeds (*Agra Bank, Ltd. v. Barry* (1874), L.R. 7 H.L. 135; *Oliver v. Hinton*, [1899] 2 Ch. 264). Where both the mortgages were equitable, the first in time prevailed, provided the equities were in other respects equal. Hence, if the first equitable mortgagee failed to ask for, or to retain the title deeds, he might be postponed to a subsequent equitable mortgagee who took proper precautions.

The priority of mortgages of an equitable interest in pure personality was governed by the rule in *Dearle v. Hall* (1828), 3 Russ. 1. Priority depended on the order in which notice of the mortgages was received by the trustees, but a mortgagee who had notice of a prior mortgage when his own was created, could not gain priority by being the first to give notice.

Priorities acquired before 1926 are not affected (L.P.A. s. 94 (3)). Since 1926 there may be more than one legal mortgage of the same estate. Every mortgage of a legal estate in land made after 1925 whether the mortgage is legal or equitable (not being a mortgage protected by the deposit of documents related to the legal estate affected), ranks according to its date of registration as a land charge under the Land Charges Act, 1925 (L.P.A., s. 97). Probably mortgages protected by deposit of title deeds rank for priority according to the dates on which they were created. The Land Charges Act, 1925 s. 10 (1) provides for the registration of, (a) a puisne mortgage, i.e.: legal mortgage not protected by title deeds, in Class C (i), and (b): general equitable charge, not secured by deposit of title deeds and not arising under a trust for sale or a settlement in Class C (iii). The Land Charges Act, 1925, s. 13 (2) enacts that a land charge of Class C created after 1925, shall be void against a purchaser of the land

charged therewith, or of any interest therein, unless the land charge is registered in the appropriate register before completion of the purchase. Purchaser means, "any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land, or in a charge on land" (*ibid.* s. 20). So that where a mortgage capable of being registered has not been registered, a subsequent mortgagee, even with actual notice of it, takes free from it (L.P.A., s. 199). There are still some points of uncertainty (*cf.* L.P.A., s. 97 and L.C.A., s. 13).

Mortgages protected by deposit of title deeds probably rank according to the order of their creation, but a mortgagee may lose his priority if, for example, he returns the title deeds to the mortgagor who uses them to create another mortgage; or if his mortgage is equitable, by a legal mortgage being made to a mortgagee for value without notice. A mortgagee not protected by title deeds who fails to register is postponed to a later mortgagee (L.C.A., 13 (2)), unless, perhaps, the first mortgagee in fact registers before the second mortgagee (L.P.A., s. 97). Once a mortgagee registers, he retains his priority against all subsequent mortgages.

The priority of mortgages of an equitable interest in land or pure personalty is governed by the rule in *Dearle v. Hall* as amended by the Law of Property Act, 1925, ss. 137, 138. It depends upon the order in which notice in writing is received by the trustees or legal owner. The persons to be served with notice are, the trustees of the settlement in the case of settled land, the trustees for sale, in the case of land held on trust for sale, the estate owner of the land affected in the case of other land. It is advisable to give notice to all the trustees. Provision is made in cases where a valid notice cannot be served, or can only be served at unreasonable cost or delay, that a purchaser may require a memorandum to be endorsed on or annexed to the instrument creating the trust, and this will have the effect of notice. The instrument creating the trust, the trustees or the court may nominate a trust corporation to receive notices. Any person interested in the equitable interest may now apply to the trustees or estate owner for the production of any notices served upon them (*ibid.* s. 137 (8)).

1372. The holder of an equitable mortgage *Tacking* cannot by taking a transfer of a legal mortgage on the same land, become entitled to add the amount of his claim on the equitable mortgage to the sum due on the legal mortgage in priority to an equitable mortgage.^(a) A prior mortgagee may tack further advances, where, (i) the intervening mortgagees agree, (ii) he has no notice of an intervening mortgage.

But registration amounts to notice, except where the prior mortgage was made expressly for securing further advances, and here registration amounts to notice only when the intervening mortgage was registered when the last search was made by the prior mortgagee. If the intervening mortgagee is protected by deposit of title deeds, or if he gives express notice to the prior mortgagee, the latter cannot tack, even where his mortgage is expressly made for securing further advances, (iii) the mortgage imposes an obligation upon him to make further advances, and no form of notice will prevent tacking in this case.^(b)

(a) L.P.A., 1925, s. 94 (3).

(b) *Ibid.* s. 94 as amended by L.P.(Am.)A., 1926 Sched.

Before 1926, tacking of the form known as *tabula in naufragio* was possible where an equitable mortgagee without notice of a prior equitable mortgage, at the time when he advanced his money obtained priority over it by subsequently acquiring the legal estate in the land. If X made a legal mortgage to A, and successive equitable mortgages to B and C, A had priority; but if C when he advanced his money had no notice of B, then bought A's legal mortgage, he obtained priority over B, and would be repaid both his own equitable mortgage and the legal one he had bought from A, before B received anything (*Taylor v. Russell*, [1892] A.C. 244; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231). Before 1926, a mortgagee who made a further advance on his original mortgage could claim priority for both loans, over an intervening mortgagee, (i) when the latter agreed, (ii) where at the time of his further advance he had no notice of the intervening mortgagee. If he had notice, he could not tack even if he was bound to make further advances (*West v. Williams*, [1899] 1 Ch. 132; *Hopkinson v. Rolt* (1861), 9 H.L.Cas. 514). Tacking by *tabula in naufragio* is now abolished, and tacking of further advances no longer depends on whether the mortgages are legal or equitable. An example of a mortgage made expressly for securing further advances is one to secure an overdraft at a bank, where the debt is increased or decreased as money is paid in or drawn out. A banker mortgagee would be placed in an intolerable position if he had always to search the register before making a further advance. Hence, in this case only, registration of an intervening charge does not of itself constitute notice of it, unless it was registered at the date of the original advance or when the last search was made on behalf of the mortgagee seeking to tack (L.P.A., 1925, s. 94 (2)).

1373. A mortgagee of land may, subject to the rights of the mortgagor and other persons interested in the equity of redemption, transfer his mortgage debt and interest in the mortgaged property, either absolutely or by way of sub-mortgage; and his transferee or sub-mortgagee will, subject to the terms of the mortgage, and those of the transfer or sub-mortgage, enjoy all the rights of the original mortgagee.^(a) The interest of the mortgagee, even when the mortgaged property is realty, is personal estate.^(b)

*Dealings
with mort-
gage*

(a) L.P.A., 1925, s. 114.

Re Southampton's (Lord) Estate, Allen v. Southampton (Lord), Bonfather's Claim (1880), 16 Ch. D. 178.

Turner v. Smith, [1901] 1 Ch. 213.

Notice to the mortgagor of the transfer is not essential to render the transaction effectual between the mortgagee and the transferee; but, as the above cases show, it is necessary to prevent the transferee being prejudiced by subsequent dealings between the original mortgagee and the mortgagor.

(b) *Casborne v. Scarfe* (1738), 1 Atk. at p. 605, *per* Lord HARDWICKE, C. (Consequently, a devise of "lands" generally, will not pass the beneficial interest in land vested in the testator by way of mortgage, or the mortgage debt (*Winn v. Littleton* (1681), 1 Vern. 3).) Probably, the mortgagee cannot transfer part of the mortgage debt in such a way as to divide his remedies and powers between himself and his transferee (*Flower & Sons, Ltd. v. Pritchard* (1908), 53 Sol. Jo. 178; *Williams v. Atlantic Assurance Co.*, [1933] 1 K.B. 81; *Forster v. Baker*, [1910] 2 K.B. 636).

1374. Every legal mortgagee (including the registered proprietor of a registered charge) has, subject to the terms of the mortgage, after the mortgage money has become due, and independently of any express authority contained in the mortgage, the following remedies for the enforcement of his security, viz. :—

*Non-statutory powers
of mortgagee*

(i) the right to take possession or receive the rents of the mortgaged property;

L.P.A., 1925, ss. 87, 99.

Land Registration Act, 1925, s. 34 (1).

Doe d. Roylance v. Lightfoot (1841), 8 M. & W. 553.

Bovill v. Endle, [1896] 1 Ch. 648.

Unless there is any stipulation to the contrary in the mortgage, the mortgagee may exercise this right at any time after the making of the mortgage (*Doe d. Roylance v. Lightfoot, ubi supra*) ; but one drawback of such a step is, that it entitles the mortgagor to pay off the mortgage at once without notice (*Bovill v. Endle, ubi supra*). Another drawback is, that the mortgagee in possession is bound to account, not only to the mortgagor or his representative (*Wragg v. Denham* (1836), 2 Y. & C. (Ex.) 117 ; *Taylor v. Mostyn* (1886), 33 Ch. D. 226), but to subsequent incumbrancers, and even after he has assigned the mortgage (*Venables v. Foyle* (1661), 1 Cas. in Ch. 2), unless he has assigned it under an order of the Court (*Hall v. Heward* (1886), 32 Ch. D. 430), for all the profits which he has received, or, without wilful default, might have received (*White v. City of London Brewery Co.* (1889), 42 Ch. D. 237). If the mortgagee occupies the property himself instead of letting it, he is charged with a fair occupation rent, unless through ruinous condition, it is incapable of beneficial occupation (*Bright v. Campbell* (1885), 54 L.J. (Ch.) 1077). A mortgagee in possession may relieve himself of his position and responsibility by appointing a receiver under his statutory power, or where the Court appoints one (*Refuge Assurance Co. Ltd. v. Pearlberg*, [1938] Ch. 687).

- (ii) the right (unless excluded by the terms of the mortgage) by action or other proceedings to recover from the mortgagor personally the amount due on the mortgage ;

Land Registration Act, 1925, s. 28 (1).

Meynell v. Howard (1696), Prec. Ch. 61.

King v. King (1735), 3 P. Wms. 358.

But, if there is no covenant, express or implied, for payment of the money, the debt will be only simple contract. And the mortgagee cannot sue the assignee of the equity of redemption personally to recover the mortgage money, or prove in his bankruptcy, even if he has paid interest (*Ancaster (Duke) v. Mayer* (1785), 1 Bro. C.C. at p. 464, *per* Lord THURLOW, C. ; *Re Errington, Ex parte Mason*, [1894] 1 Q.B. 11).

- (iii) the right to obtain from the Court an absolute order of foreclosure, excluding the mortgagor from all further right to redeem the mortgage.

Land Registration Act, 1925, s. 34 (3).

Such an order will be made as of course if any money remains due ; but an order *nisi* will first be made, directing accounts to be taken by the Master, and giving the mortgagor, at least in the case of a formal mortgage, six months from the date of the Master's

certificate, in which to redeem. A personal order for payment within a much shorter time (e.g. a month) of the money due may be made, however, if asked for by the writ (*Farrer v. Lacy, Hartland & Co.* (1885), 31 Ch. D. at p. 50 per FRY, L.J.). An equitable mortgagee cannot take possession (*Garfitt v. Allen* (1887) 37 Ch. D. at p. 50, *per* NORTH, J.) ; but he has the other rights described in the paragraph. The effect of a foreclosure decree absolute is to make the mortgagee absolute owner of the interest mortgaged (*Re Loveridge, Pearce v. Marsh*, [1904] 1 Ch. 518).

1375. Where the mortgagee is a trustee in whom the mortgaged property is vested by way of security *semble*, on behalf of his *cestuis que trustent*), and, by virtue of the Limitation Act, or of an order for foreclosure or otherwise, discharged from the right of redemption, it will be held by him on trust for sale. *Trust mortgage remains personalty*

L.P.A., 1925, s. 31 (1).

The proceeds of the sale will, of course, go to swell the trust fund in the hands of the mortgagee-trustee (*ibid.* (2)). The land will, therefore, be treated as personal estate (*Re Loveridge, Pearce v. Marsh, ibi supra*).

1376. A mortgagee who, after obtaining a foreclosure, sues the mortgagor on his personal liability, re-opens the foreclosure, i.e. enables the mortgagor to redeem ;^(a) and, if the mortgagee has parted with the land after foreclosure, he cannot sue the mortgagor personally to recover the mortgage money.^(b) *Re-opening foreclosure*

(a) *Dashwood v. Blythway* (1729), 1 Eq. Cas. Abr. 317.
Kinnaird v. Trollope (1888), 39 Ch. D. 636.

(b) *Perry v. Barker* (1806), 13 Ves. 198.

Consequently, an action against the mortgagor personally enables the latter to redeem ; and unless the mortgagee can return the mortgaged land, he will be defeated except where he has sold under a power of sale or with the concurrence of the mortgagor (*Kinnaird v. Trollope, ibi supra* ; *Ellis & Co's Trustee v. Dixon-Johnson*, [1925] A.C. 489). The Court has a wide power to re-open a foreclosure (*Campbell v. Holyland* (1877), 7 Ch. D. 166).

1377. Generally speaking, a mortgagee in possession, though accountable for the surplus rents and profits after discharging interest, will not be com- *Annual rents*

pelled to deduct them, as they accrue, from the principal, so as to reduce the debt by instalments.^(a) But if there was no interest in arrear when he entered, or if the whole of the principal and interest has been covered by the receipts, the mortgagee in possession will be compelled to account with annual rests, and to pay compound interest at four *per cent.* on the amount found due from him.^(b)

(a) *Wrigley v. Gill*, [1905] 1 Ch. at p. 253, *per* WARRINGTON, J.

Ainsworth v. Wilding, *ibid.* at p. 440, *per* JORCE, J.

(b) *Ashworth v. Lord* (1887), 36 Ch. D. 545.

Consequently, if there is a provision in the mortgage for capitalization of interest in arrear, it cannot be enforced, so long as the amount of rents and profits received by the mortgagee exceeds the amount of interest due (*Wrigley v. Gill*, [1906] 1 Ch. 165).

*Leases and
cutting of
timber by
mortgagee*

1378. Subject to § 1383, where a mortgagee is in possession of land under a mortgage by deed or registered charge made after 31st December 1881,^(a) or where he has appointed a receiver, who still acts, under the statutory power described in § 1379 (ii) *post*,^(b) he may, subject to the terms of the mortgage deed or otherwise in writing :^(c)—

(a) L.P.A., 1925, s. 99 (16).

(b) *Ibid.* (19).

(c) *Ibid.* (13).

- (i) grant agricultural or occupation leases of any part of the land for any terms not exceeding fifty,^(a) or building leases for any terms not exceeding nine hundred and ninety-nine years,^(b) to take effect in possession not later than twelve months after their dates, at the best rent that can reasonably be obtained without fine, which leases will be binding on all prior incumbrancers and the mortgagor ;^(c)

(a) In mortgages before 1926, twenty-one years.

(b) In mortgages before 1926, ninety-nine years.

(c) L.P.A., 1925, s. 99 (3).

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Various provisions for securing the formality and effectiveness of the leases are contained in sub-sections (7)–(11). And a mortgagee in possession, or who has appointed a still acting receiver, may accept surrenders of existing leases with a view to granting leases authorized by the Act, or the mortgage deed, or an agreement pursuant to the Act, but this power only exists when the mortgage was made after 1911 (*ibid.* s. 100).

- (ii) cut and sell timber and other trees ripe for cutting, and not planted or left for shelter or ornament, or contract for any such cutting and sale, to be completed within twelve months from the making of the contract.

L.P.A., 1925, s. 101 (1) (iv).

Apart from the Act, a mortgagee can only cut timber if he shows the security to be defective (*Withrington v. Banks* (1725), Cas. temp. King, 42).

1379. Subject to §§ 1381, 1383, 1384 *post*, a mortgagee by deed executed after 31st December 1881, or by registered charge, whether in possession of the mortgaged property or not, but only when the mortgage money has become due, may, subject to the terms of the mortgage :

Other statutory powers of mortgagee

- (i) sell, or concur in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, in any reasonable manner ;

L.P.A., 1925, s. 101 (1) (i).

Land Registration Act, 1925, s. 34 (1).

Although the mortgagee has only a term of years, he can convey the fee simple which is vested in the mortgagor, or if it is a mortgage of leaseholds, the whole lease vested in the mortgagor (L.P.A., 1925, ss. 88 (1), 89 (1)). The mortgagee holds any surplus produced by a sale after satisfying his claim, for the person "entitled to the mortgaged property" (L.P.A., 1925, s. 105), which, presumably, means the person who was entitled to it (subject to the mortgage) before the sale. A mortgagee cannot sell to himself either alone or with others, nor to a trustee for himself (*Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, at p. 409 *per* LINDLEY, L.J.), unless the sale is made by the Court and he has obtained leave to bid. A higher obligation is imposed on a building society in the exercise of a power of sale than on an

ordinary mortgagee (*Reliance Permanent Building Society v. Harwood-Stamper*, [1944] Ch. 362). Conversely, if there has been a proper sale (even to the mortgagee himself), the latter may sue the mortgagor personally to make up any deficiency, without being compelled to allow redemption (*Gordon Grant & Co. v. Boos*, [1926] A.C. 781). Of course, the mortgagee cannot compel prior incumbrancers to join in the sale ; but a useful section (s. 50) of the L.P.A., 1925, allows the Court to authorize a sum of money to be paid into Court to meet prior incumbrances, and to declare the land free from incumbrance.

- (ii) appoint by writing from time to time a receiver of the income of the mortgaged property or any part thereof, who will, unless the mortgage otherwise provides, be deemed the agent of the mortgagor, and who will have power to demand and recover all the income of such property by action, distress, or otherwise, in the name of the mortgagor or of the mortgagee.

L.P.A., 1925, s. 101 (1) (iii), s. 109.

Land Registration Act, 1925, s. 34 (1).

The moneys coming to the receiver are to be employed (1) in discharging outgoings, (2) in keeping down prior charges, (3) in paying the receiver's commission, premiums on insurance, and repairs authorized by the mortgagee in writing, (4) in paying the mortgagee's interest, and, if so directed by the mortgagee, to reduction of the principal. The balance (if any) is to be paid to the person entitled to the income subject to the receiver (L.P.A., 1925, s. 109 (8)).

*Special
terms of sale*

1380. Where the mortgage deed was executed after 1911, a mortgagee, exercising his power of sale under § 1379 (1) may—

- (i) impose on any part of the land sold, or any part remaining unsold, any restriction or reservation, with respect to building on, or other user of, such land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing ;
- (ii) sell the mortgaged property, or any part

thereof, or any mines and minerals apart from the surface—

- (a) with or without a grant or reservation of easements, rights, and privileges in relation to the property remaining in mortgage or the part sold ;
- (b) with or without an exception or reservation of all or any of the mines or minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, or other powers, easements, rights, and privileges for mining purposes, in relation to the property remaining unsold, or any property sold ;
- (c) with or without covenants by the purchaser to expend money on the land sold.

L.P.A., 1925, s. 101 (2).

1381. The mortgagee must not exercise the powers of sale or appointment of a receiver described in § 1379, until there has occurred— *Restrictions on powers*

- (i) three months' default in payment of the mortgage money after written notice to the mortgagor to pay the same ; *or*
- (ii) failure to pay any part of the interest for two months after it became due ; *or*
- (iii) some breach of a provision made on the part of the mortgagor or a person concurring in the mortgage, other than the covenant for payment of mortgage money and interest.^(a)

The power of sale conferred by the Law of Property Act does not affect the right of foreclosure.^(b)

(a) L.P.A., 1925, s. 103.

(b) *Ibid.* s. 106 (2).

A mortgagee who has obtained a foreclosure order *nisi* cannot, without leave of the Court, properly exercise his power of sale; but a *bond fide* purchaser from him will be protected (*Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857). Subject to these reservations, the power of sale, except in the case of a registered charge (Land Registration Act, 1925, s. 31), can be exercised by any one entitled to receive and give a discharge for the mortgage money (L.P.A., 1925, 106 (1)); and such person can obtain from any one, other than a prior incumbrancer, any deed or document of title relating to the property, to which a purchaser under the power of sale would be entitled (*ibid.* s. 106 (4)). Where the mortgage is made by deed, the statutory power of sale arises when the mortgage money is due for repayment (L.P.A., 1925, s. 101 (1), but it only becomes exercisable when one of the three conditions mentioned above (*ibid.* s. 103) has been satisfied. If the mortgagee attempts to sell before the mortgage money is due, it operates merely as a transfer of the mortgage, the purchaser taking the mortgagee's term subject to redemption, for the power to sell free from the liability to be redeemed has not yet arisen. But if the mortgage money is due, i.e. where the power of sale has arisen, the mortgagee can sell and make a good title free from the equity of redemption, even if the power of sale has not become exercisable; the purchaser's title cannot be impeached merely because none of the three events specified has occurred or that the power was otherwise improperly or irregularly exercised. Any person damnified by an unauthorised or improper or irregular exercise of the power of sale has a remedy in damages against the person exercising it. A purchaser from a mortgagee must, therefore, satisfy himself that the power of sale has arisen, but he is not concerned to see that it has become exercisable, although if he knows of some irregularity he should not proceed with the purchase (*ibid.* s. 104). Where a mortgagee has, in exercise of his power of sale entered into a contract for the sale of the property, the Court will not, on tender of the money due under the mortgage, interfere to stop the completion of the sale by conveyance, unless the contract was entered into in bad faith (*Waring (Lord) v. London and Manchester Assurance Co., Ltd.*, [1935] Ch. 310).

*Power to
insure*

1382. Subject to § 1383, a mortgagee by deed executed since 1881, or by a registered charge, whether in possession or not, and whether the mortgage money has become due or not, may (subject to the terms of the mortgage), unless an adequate insurance is maintained by the mortgagor, insure any building, or any effects or property of an insurable

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nature, being part of the mortgaged property, against loss or damage by fire ; and the premiums paid for any such insurance will be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

L.P.A., 1925, s. 101 (1) (ii).

There are certain regulations as to the amount for which, and the circumstances in which, the mortgagee may insure. The mortgagee may require all money received on an insurance effected under the deed or the Act to be applied in making good the damage caused by a fire, or (subject to legal or contractual obligations to the contrary) towards discharge of the amount due under the mortgage (L.P.A., 1925, s. 108 (4)).

1383. The mortgagee's statutory powers of sale, leasing, insurance, and appointment of a receiver, only apply in so far as a contrary intention is not expressed in the mortgage deed, and may be varied or extended by the deed. *Mortgagee's powers may be varied*

L.P.A., 1925, s. 101 (3) (4).

1384. In any action for foreclosure or redemption, or for raising and payment in any manner of mortgage money, the Court may, on the application of any person interested either in the mortgage money or the right of redemption, direct a sale (of the mortgaged property) on such terms as the Court thinks fit, without previously determining the priorities of incumbrancers.^(a) But such a direction may be revoked, and an order of foreclosure made, if the Court thinks fit.^(b) *Sale instead of foreclosure or redemption*

(a) L.P.A., 1925, s. 91.

This section is of great use to informal mortgagees. Before the Conveyancing Act, 1881, was passed, it was doubtful whether a mortgagee by deposit of title deeds was entitled to a sale ; unless there was a written agreement by the mortgagor to execute a formal mortgage (*Oldham v. Stringer* (1884), 51 L.T. 895). Now he can bring an action for foreclosure, and ask for a sale.

- (b) *Lloyds Bank, Ltd. v. Colston* (1912), 106 L.T. 420. (On the ground that the property was worth less than the amount due to the mortgagee, and that a sale would be a useless expense.)

*Right of
redemption*

1385. A mortgagor may, subject to the rights of the mortgagee or mortgagees, sell, mortgage, lease, surrender, or otherwise deal with his right of redemption in the land,^(a) in the same manner as any other interest; and such right of redemption will be deemed to be real or personal estate in accordance with the character of the property mortgaged.^(b)

- (a) Before 1926, when the legal fee simple was conveyed to the mortgagee, the mortgagor's equity of redemption was not a mere right, but was an equitable estate in the land which could be devised or granted (*Casborne v. Scarfe* (1738), 1 Atk. 603). To-day, the mortgagee takes a legal term of years only, and the legal estate in fee simple in reversion remains in the mortgagor. There is, therefore, some difficulty in treating his equity of redemption as a separate equitable interest; and though the terms "equity of redemption" and "right of redemption" are both used in the Law of Property Act, 1925, what the mortgagor really has, is the legal estate in fee simple subject to a mortgage term, with an equitable right, after the day fixed by the mortgage for redemption is passed—for until then he has a legal right of redemption—to redeem the mortgage, and get rid of the term. On repayment, the mortgage term ceases, and the mortgage is gone. In *Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29, the Court of Appeal do not appear to have troubled themselves about any change in the nature of the mortgagor's interest made by the Law of Property Act, 1925, and treated it as still governed by Lord HARDWICKE's definition in *Casborne v. Scarfe*, *supra*.

- (b) *Casborne v. Scarfe* (1738), 1 Atk. at p. 605, *per* Lord HARDWICKE, C. *West v. Williams*, [1899] 1 Ch. at p. 143, *per* LINDLEY, M.R.

The purchaser of the right of redemption is, in general, bound in equity to indemnify the mortgagor against liability for payment of the mortgage debt (*Waring v. Ward* (1802), 7 Ves. at p. 337, *per* Lord ELDON, C.). But this rule does not apply where the circumstances of the transfer rebut the presumption that such was the intention of the parties (*Mills v. United Counties Bank, Ltd.*, [1912] 1 Ch. 231). A lease of mortgaged land granted by the mortgagor, but not under his statutory powers, is binding as between him and the lessee, but not as between the mortgagee and the lessee (*Towerson v. Jackson*, [1891] 2 Q.B. 484), and the exclusion of the statutory power of leasing does not deprive the mortgagor of his common law power (*Iron Trades Employers Insurance Assoc. Ltd. v. Union Land and House Investors, Ltd.*, [1937] Ch. 313).

1386. Subject to §§ 1374 (iii) and 1383 (i), any person interested in any property subject to a mortgage may, at any time after the mortgage money has become due,^(a) and at any time before the mortgagee has actually parted with the property to a person entitled to hold it against equitable claims,^(b) redeem the property, on payment to the mortgagee of the amount due for principal, interest, and costs.^(c) And any person entitled to redeem mortgaged property may have an order for sale instead of redemption, in any action brought by him for sale or redemption (of the mortgage).^(d)

(a) *Brown v. Cole* (1845), 14 Sim. 427.

(b) *Ante*, 1225. (Again, is this rule changed when in fact the person seeking to redeem has a legal right?)

(c) *Christian v. Field* (1842), 2 Hare, 177 (creditors in administration suit).

Smith v. Green (1844), 1 Coll. 555 (subsequent incumbrancer).

Batchelor v. Middleton (1848), 6 Hare, 75 (legatees having a charge on the equity).

Pearce v. Morris (1869), 5 Ch. App. at p. 229, *per* Lord HATHERLEY C.

Anderson v. Pignet (1872), 8 Ch. App. at p. 190, *per* MELLISH, L.J. (dowress).

Beckett v. Buckley (1874), L.R. 17 Eq. 435 (judgment creditor of mortgagor).

Bankruptcy Act, 1914, Sched. II, r. 13 (a) (trustee in bankruptcy of mortgagor).

Tarn v. Turner (1888), 39 Ch. D. 456 (lessee of equity).

(d) L.P.A., 1925, s. 91 (1).

Owing to expressions of WRIGHT, J., in *Re Vautin, Ex parte Saffery*, [1899] 2 Q.B. 549, there seems to be some little doubt whether the trustee in bankruptcy of the mortgagor is entitled to redeem; unless the mortgagee claims to vote or receive a dividend in the bankruptcy. But see *Re Button, Ex parte Voss*, [1905] 1 K.B. 602. The person seeking to redeem must, in general, give the mortgagee six months' notice, or pay six months' interest. But if the mortgagee has taken any steps to enforce payment, the mortgagor may pay off at once (*Bovill v. Endle*, [1896] 1 Ch. 648; *Edmonson v. Copland*, [1911] 2 Ch. 301); and, in any case, the mortgagor can pay off on the day fixed by the mortgage for repayment, without notice. Where no day is fixed for payment the mortgagor must give reasonable notice (*Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385). It is the duty of the mortgagee on redemption to hand over the title-deeds and make a reconveyance or give a receipt for the mortgage money to the redeem-

ing party ; but if the latter appears to have only a limited interest in the equity of redemption, the reconveyance should be so worded as to reserve the rights of other persons interested (*Pearce v. Morris, ubi supra*). A mortgagee who unreasonably refuses to reconvey on tender, is liable to be ordered to pay the costs of a redemption action (*Smith v. Green, ubi supra*) ; and, *semble*, the person redeeming can still demand a formal reconveyance, though a proper receipt for the mortgage money, endorsed on the mortgage, will have the same effect. A receipt endorsed on, or annexed to, the mortgage deed, signed by the mortgagee and stating the name of the person paying the money, normally operates as a surrender of the mortgage term or a reconveyance, as the case may be, and discharges the mortgage. But if the receipt shews that the person paying the money was not entitled to the immediate equity of redemption and makes no provision to the contrary, it operates as a transfer of the mortgage to him (L.P.A., 1925, s. 115 (5), (6)). It has been held (*Ramsbottom v. Wallis* (1835), 5 L.J. (Ch.) 92) that a subsequent mortgagee whose right to enforce his mortgage is not yet exercisable, cannot redeem a prior mortgage ; although the prior mortgage is redeemable by the mortgagor. But the terms of the second mortgage were peculiar in this case. Until 1926, a mortgagor who made a subsequent mortgage, concealing a former mortgage on the same land, was barred of his right to redeem the earlier mortgage (4 W. and M. (1692) c. 16). But this Act was repealed by the L.P.A., 1925, Sched. VII.

Condition

1387. A condition as to time will not prevent the redemption of a mortgage ; but it may, if not oppressive or unconscionable, delay it (§1389 *infra*).

Effect of reconveyance

1388. A reconveyance or receipt to or for the benefit of the mortgagor on redemption operates for the benefit of the encumbrancer next in succession, if any ; and the mortgage debt is extinguished ^(a) (*ante*, § 1386, n.). But where the mortgage is redeemed by a third party, and the effect of a merger of the debt would be to make a gift to the next incumbrancer or person interested, at the expense of the party redeeming, there is a presumption that the party redeeming the mortgage intended to keep alive the mortgage, and it will be treated as still subsisting for his benefit. ^(b)

(a) L.P.A., 1925, s. 115 (1). (But the section does not apply to the discharge of a registered charge under the Land Registration Act, 1925 (*ibid.* 10). L.R.A., 1925, s. 35.)

Toulmin v. Steere (1817), 3 Mer. 210.

Otter v. Vaux (Lord) (1856), 2 K. & J. 650.

Toulmin v. Steere has been severely criticized ; and it went much further than is necessary to support the proposition for which it is quoted. But for that proposition it is good authority.

(b) *Burrell v. Egremont* (Earl) (1844), 7 Beav. 205.

Thorne v. Cann, [1895] A.C. 11.

Liquidation Estates Purchase Co. v. Willoughby, [1898] A.C. 321.

Whiteley v. Delaney, [1914] A.C. 132.

1389. Any stipulation contained in a mortgage, "Clogging the equity" or forming part of a mortgage transaction, will be unenforceable against the mortgagor, or the person seeking to redeem the mortgage, in so far as it contemplates any of the following objects, viz. :—

Whether or not the stipulation is part of the mortgage transaction, is a question of fact in each case. Generally speaking, if it is not, it will be enforceable (*Reeve v. Lisle*, [1902] A.C. 461 ; *De Beers Consolidated Mines, Ltd. v. British South Africa Co.*, [1912] A.C. 52).

(i) the extravagant postponement of the contractual right to redeem, which is, on the facts, oppressive or unconscionable ;

Knightsbridge Estates Trust, Ltd. v. Byrne, [1939] Ch. 441 at pp. 455-461, per GREENE, M.R. (affirmed on other grounds, [1940] A.C. 613).

It is essential to distinguish the contractual from the equitable right to redeem. The usual period of the former is six months, but the parties may fix any other period. The equitable right arises when the contractual right expires. GREENE, M.R. (now Lord GREENE) at p. 456 in the *Knightsbridge Case* points out that the proposition that a postponement of the contractual right of redemption is only permissible for a reasonable time is not well founded ; and he reviews and explains the earlier cases. A mortgage cannot be made irredeemable, nor can the right of redemption be made illusory, and a postponement of the right of redemption cannot be set aside on the ground that its length is unreasonable, but only on the ground that it is "the badge" of oppression (p. 459). In *Biggs v. Hoddinott*, [1898] 2 Ch. 307, the mortgage was for five years certain ; it was held to be valid not because the period was reasonable, but because it was to the advantage of both parties and they had equal contractual capacity. In *Morgan v. Jeffreys*, [1910] 1 Ch. 620, there was a proviso for repayment in six months, and a covenant by the mortgagor not to redeem for twenty-eight years, but no covenant by the mortgagee not to call in his money for the same period. The covenant was void as

a device making the contractual right to redeem inoperative. In *Fairclough v. Swan Brewery Co., Ltd.*, [1912] A.C. 565, a lease for twenty years was mortgaged and the contractual right to redeem was postponed until six weeks before the expiration of the lease. It was held void on the ground that the right of redemption was wholly illusory.

- (ii) the hampering of redemption after the contractual date has passed ;

Knightsbridge Case, *supra* at p. 456.

- (iii) the imposition of a higher rate of interest as a penalty for unpunctual payment of a lower ;

Holles (Lady) v. Wyse (1693), 2 Vern. 289, overruling *Hallifax (Marquis) v. Higgins* (1689), 2 Vern. 134.

But it is not a penalty to stipulate for interest at one rate, reducible to a lower on punctual payment (*Strode v. Parker* (1694), *ibid.* 316), or that, on failure to pay an instalment of capital, the whole shall become due (*Wallingford v. Mutual Society* (1880), 5 App. Cas. at p. 696, *per* Lord SELBORNE, C.), or to arrange for interest in arrear to be added to capital (*Wrigley v. Gill*, [1906] 1 Ch. 165).

- (iv) the giving to the mortgagee a right or option to purchase the equity of redemption ;

Bowen v. Edwards (1661), 1 Rep. Ch. 221.

Willet v. Winnell (1687), 1 Vern. 488.

Samuel v. Farrah Timber and Wood Paving Corporation, [1904] A.C. 323.

It has been questioned whether a mortgagee could enforce, during the continuance of the mortgage, a stipulation giving him a right of pre-emption in the event of the mortgagor selling the property (*Orby v. Trigg* (1722), 9 Mod. Rep. 2).

- (v) the retention by the mortgagee of any collateral advantage, or any right or claim, against the mortgaged property^(a) or the mortgagor,^(b) or, *semble*, any other person,^(c) after the redemption of the mortgage, if it is,

(1) unfair or unconscionable, or

(2) in the nature of a penalty clogging the equity of redemption, or

(3) inconsistent with, or repugnant to, the contractual and equitable right to redeem.^(d)

- (a) *Noakes & Co., Ltd. v. Rice*, [1902] A.C. 24, Cf. *Santley v. Wilde*, [1899] 2 Ch. 474.
- (b) *Bradley v. Carritt*, [1903] A.C. 253.
- (c) *Ibid.* at p. 261.
- (d) *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A.C. 25
Knightsbridge Case, *supra* at p. 462.

Collateral advantages giving the mortgagee some other advantage in addition to his security, such as, that the mortgagor will buy all beer from him, were originally held void (*Jennings v. Ward* (1705), 2 Vern. 520) and later that they were bound to end on redemption (*Bradley v. Carritt*, [1903] A.C. 253). The rule now is, that they are valid provided they do not conflict with (v) above, and the Court tends to avoid interfering with a reasonable commercial bargain, which though included in the mortgage deed, can be regarded as collateral to and distinct from the mortgage transaction.

(vi) the imposition of any penalty on or difficulty in the exercise of the right of redemption.

Davies v. Chamberlain (1909), 26 T.L.R. 138 (where, however, the stipulation was held not to be part of the mortgage transaction).
Fairclough v. Swan Brewery Co., Ltd., [1912] A.C. 565.

Any provision which attempts to prevent redemption entirely, or after some future event, is void in equity as being inconsistent with the essential feature of a mortgage, namely, the right to redeem. The maxim is, "Once a mortgage always a mortgage". Examples of void provisions are *Salt v. Northampton (Marquess)*, [1892] A.C. 1.—irredeemable after the death of the mortgagor; *Howard v. Harris* (1681), 1 Vern. 33—redeemable only by the mortgagor and the heirs of his body, and no one else. Debentures are not invalid by reason only that they are made irredeemable (Companies Act, 1929, s. 74).

At one time, it was very common for a mortgagor in actual occupation of the mortgaged property to attorn tenant to the mortgagee in the mortgage deed, at a rent equivalent to the amount of the annual interest; the chief object being to give the mortgagee a right of distress on non-payment of the interest. But this result can clearly not be achieved without registration under the Bills of Sale Acts (*post*, §§ 1499, 1507); the attornment clause still creates the relation of landlord and tenant between the mortgagee and the mortgagor and enables the mortgagee to recover possession summarily before the justices, a thing which he could not do if he were merely a mortgagee (Small Tenements Recovery Act, 1838, s. 1). For proceedings in the High Court or a County Court, the attornment clause, under the present practice, appears to offer no advantage.

1390. Unless a contrary intention is expressed in the mortgage deeds or one of them, a mortgagor can

No "consolidation" unless reserved

redeem any mortgage made since 1881, without redeeming any other mortgage held by the mortgagee solely on any property other than that comprised in the mortgage sought to be redeemed.^(a) This rule does not apply where all the mortgages (sought to be redeemed) were made before 1882.^(b)

(a) L.P.A., 1925, s. 93 (1).

Griffith v. Pound (1890), 45 Ch. D. 553.

* *Re Salmon, Ex parte Trustee*, [1903] 1 K.B. 147.

(b) L.P.A., 1925, s. 93 (2).

“Consolidation”

1391. When Section 93 of the Law of Property Act, 1925, does not apply, a mortgagee can refuse to allow redemption of any mortgage, after the day fixed for repayment of the money thereby secured has passed,^(a) unless the person seeking to redeem will also redeem any other overdue^(b) mortgage created by the same mortgagor,^(c) in the hands of the mortgagee, the equity of redemption whereof has, at any time since both mortgages came into the hands of the mortgagee, been vested, together with the equity of redemption of the mortgage sought to be redeemed, in the person seeking to redeem, or any person through whom he claims^(d) (“consolidation”).

(a) *Cummins v. Fletcher* (1880), 14 Ch. D. 699.

This is an essential condition of the equitable right to consolidate. If the mortgagor is relying on a legal right to redeem, there is no opportunity of imposing terms upon him.

(b) *Sharp v. Rickards*, [1909] 1 Ch. 109.

(c) *Pledge v. White*, [1896] A.C. at p. 198, *per* Lord DAVEY.

(d) *Sharp v. Rickards, ubi supra*.

The doctrine of Consolidation, which is now not much favoured by the Courts, began with the very simple case in which the same mortgagor mortgaged two different properties to the same mortgagee, allowed the days for redemption of both to pass, and then sought to redeem one mortgage, leaving the mortgagee with, perhaps, an inadequate security for the other. In such a case, the Court of Chancery applied the maxim: “he who seeks equity must do equity” (*Pope v. Onslow* (1692), 2 Vern. 286). The doctrine was then extended to

cover the much more questionable case in which one of the two equities had been sold to a stranger who sought to redeem (*Re—, Ex parte Carter* (1773), 2 Amb. 733). Finally, it was extended to cover the case in which the same mortgagor had mortgaged to different mortgagees, by mortgages which ultimately came to the same hand (*Vint v. Padget* (1858), 2 De G. & J. 611; *Selby v. Pomfret* (1861), 3 De G.F. & J. 595). But here the doctrine stopped; FRY, J., in *Harter v. Colman* (1882), 19 Ch. D. 630, refusing to extend it to the case in which the mortgagor, having assigned his first equity of redemption to A, subsequently made another mortgage to the same mortgagee, who sought to consolidate against A. (See also *Jennings v. Jordan* (1881), 6 App. Cas. 698; *Hughes v. Britannia Permanent Benefit B.S.*, [1906] 2 Ch. 607.) But where A mortgages one property to X, and another to Y, and then transfers the two equities of redemption to B, if Z subsequently acquires the mortgage terms from X and Y, he may consolidate against B (*Pledge v. White*, [1896] A.C. 187). The right of consolidation can be enforced actively by a foreclosure action (*Tribourg v. Pomfret* (Lord) and *Wilkins* (1773), 2 Amb. 733, n.), and, *semble*, also by means of a sale of the property comprised in one of the mortgages (*Selby v. Pomfret* (1861), 3 De G.F. & J. 595).

1392. A mortgagor of land while in possession, the mortgage having been made since 1881, and no receiver, who still acts, having been appointed by the mortgagee, has, subject to the terms of the mortgage deed, the same power of making leases and accepting surrenders as a mortgagee in possession (*ante*, § 1378 (i)).^(a) Such leases will take effect out of the legal estate, and bind all incumbrancers.^(b)

*Mortgagor's
power of
leasing*

(a) L.P.A., 1925, ss. 99 (1), 100 (1).

(b) *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

Consequently, even if the owner of the reversion, not being in possession, joins in the lease, the lessee's rights, though binding him, will be derived from the mortgagor in possession, as being the better title (*John Brothers Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188).

1393. A mortgagor for the time being entitled to possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of his intention to take possession or enter into the receipts and profits thereof, may sue for such posses-

*Actions
against third
parties*

sion, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

L.P.A., 1925, s. 98 (1).

This is really a procedural paragraph, which replaces s. 25 (5) of the Judicature Act, 1873. The latter provision attempted to obviate technical difficulties which arose when, for example, a mortgagor with an equitable title only, sought to bring Ejectment against a stranger (*ante*, §§ 813-818). There was no difficulty about Trespass or Case. Owing to changes in the form of mortgages (*ante*, § 1368), the provision is now of little importance, most mortgagors having now legal titles.

*May require
transfer*

1394. A person entitled to redeem a mortgage may, despite any stipulation to the contrary, require the mortgagee, if the latter is not, and has not, been in possession, on the terms upon which he would be bound to reconvey, to assign the mortgage debt and transfer the mortgaged property to any third person, as the person entitled to redeem may direct. But a requisition to this effect by a prior incumbrancer will prevail over a requisition by a later; and the requisition of any incumbrancer over a requisition of the mortgagor. This provision takes effect notwithstanding any stipulation to the contrary.

L.P.A., 1925, s. 95 (1), (2), (5).

*Power to
inspect
title-deeds*

1395. A person entitled to redeem a mortgage made since the year 1881, may, notwithstanding any stipulation to the contrary, at his own request and cost, and on payment of the mortgagee's costs and expenses occasioned thereby, inspect and make copies of or extracts from the documents of title relating to the mortgaged property, in the custody or power of the mortgagee.

L.P.A., 1925, s. 96 (1).

A mortgagee whose mortgage is extinguished will not be responsible for delivering the documents of title to a person not having the best right thereto ; unless he (the mortgagee) has notice of the claim of a person having a better right (*ibid.* (2)). Registration under the Land Charges Act does not constitute notice for this purpose (L.P.(Am.) A., 1926, Sched.). Where the mortgagee has under the Limitation Act, 1939, lost all title to the land, the mortgagor is entitled to recover possession of the title deeds. (*Lewis v. Plunket*, [1937] Ch. 306.)

1396. When two separate estates or interests have been mortgaged to A, and only one of them to B, B is entitled, as against the mortgagor and his personal representative,^(a) a surety for the mortgagor,^(b) and the trustee in bankruptcy of the mortgagor,^(c) to compel A to resort first for payment to the estate which is not mortgaged to him (B). *Marshalling*

(a) *Lanoy v. Athol (Duke and Duchess)* (1742), 2 Atk. 444, per Lord HARDWICKE, C.

Aldrich v. Cooper (1803), 8 Ves. at p. 395, per Lord ELDON, C.

Tidd v. Lister (1852), 10 Hare, 140.

Gibson v. Seagrim (1855), 20 Beav. 614.

(b) *South v. Bloxam* (1865), 2 Hem. & M. 457.

(c) *Re Tristram, Ex parte Hartley* (1835), 1 Deac. 288 (Court of Review).

Stephenson, Re, Ex parte Stephenson (1847), De G. 586 (do.).

Gibson v. Seagrim, ubi supra.

Where there are rival claims to marshal, the mortgagee of the two or more properties must pay himself rateably out of each (*Gibson v. Seagrim, ubi supra* ; *Moxon v. Berkeley Mutual Benefit Building Society* (1890), 59 L.J. Ch. 524). But the right of marshalling does not prevent a mortgagee realizing his securities in such a manner and order as he thinks fit (*Manks v. Whiteley*, [1911] 2 Ch. at p. 466, per PARKER, J.). Another instance of marshalling of mortgages occurs when two or more separate properties are mortgaged by the same mortgagor to secure a single debt. In such a case, even before the doctrine of the Real Estate Charges Acts was applied, the burden of the debt would, as between the different beneficiaries of the mortgagor, be apportioned rateably on the different properties, in proportion to their respective values (*Re Athill, Athill v. Athill* (1880), 16 Ch. D. at pp. 229, 224). Finally, when a mortgagee has a personal claim against A for a mortgage debt, and the right to redeem the mortgage has passed to B without any personal liability for the debt, if the mortgagee repays himself out of the mortgaged property, the owner of the right to redeem has a right to be indemnified by A, to the extent to which the right of redemption has been depleted by the mort-

gagee's recourse thereto (*Re Darby's Estate, Rendall v. Darby*, [1907] 2 Ch. 465 ; *Re Best, Parker v. Best*, [1924] 1 Ch. 42). But where the right of redemption has been assigned expressly subject to the mortgage debt thereon, the interest of the assignee must contribute rateably to the payment off of the mortgage debt (*Re Mainwaring, Mainwaring v. Verdon* (1936), 53 T.L.R. 103).

TITLE III—CHARGES ON LAND

1397. Subject to restrictive rules of law affecting special cases, any owner of an interest in land may charge it with liability for payment of any sum or sums of money specific or unascertained. Such charge may be effected by writing, sealed or unsealed, or by testament. *Power to charge*

Cupit v. Jackson (1824), 13 Price, 721.

White v. James (No. 2) (1858), 26 Beav. 191.

Horion v. Hall (1874), L.R. 17 Eq. 437.

Of course there are many charges on land which are not expressly created by the charger, e.g. those described in § 1400 *post*.

An equitable charge arises where property is appropriated to the discharge of some debt; it does not effect any change in the ownership either at law or in equity, but only gives a right to payment out of the property. Any informal agreement in writing whereby property is to be a security for a sum of money creates an equitable charge.

1398. The person entitled to the benefit of such a charge may, subject to the terms of the instrument creating it, and to the interests of all prior incumbrancers, apply to the Court for the appointment of a receiver of the rents and profits of the land, and a sale or mortgage of the interest subject to the charge, with a view to the realization thereof.^(a) But he is not, except in the case of a charge operating by way of legal mortgage,^(b) entitled to an order for foreclosure, or the other remedies of a mortgagee.^(c) *Rights of owner of charge*

(a) *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323.

Hambro v. Hambro, [1894] 2 Ch. 564.

Nightingale v. Reynolds, [1903] 2 Ch. 236.

(b) L.P.A., 1925, s. 87.

Sampson v. Pattison (1842), 1 Hare, 533.

(c) *Tennant v. Trenchard* (1869), 4 Ch. App. at p. 542, *per* Lord HATHERLEY, C.

Re Owen, [1894] 3 Ch. 220.

The remedy is in the discretion of the Court, unless there is an express power of sale in the instrument of charge. But it may be

granted in all cases in which any sum appears to be charged upon land or the income thereof ; even though there are no express words to that effect in the charge, and even though the owner of the charge has legal remedies, e.g. by entry and distress (*Hambro v. Hambro, ubi supra*). Where the charge is created by the testament of a person dying since 5th August 1897, there is, of course, usually no need to resort to the jurisdiction of the Court ; as the personal representatives may sell in the exercise of their general powers (Administration of Estates Act, 1925, s. 2 (1)). And, even where the death is prior to 6th August 1897, trustees of land devised charged with the payment of debts or *specific* sums of money, and executors (but not administrators), have power to sell or mortgage for payment of such charges (Law of Property Amendment Act, 1859, ss. 14, 16, 18 ; Administration of Estates Act, 1925, s. 39).

*Remedies to
enforce
annual
charge*

1399. The owner of any annual charge on land or the income of land, created since 1881, and not being rent incident to a reversion, has, subject to the terms of the instrument creating the charge, the remedies for the recovery of such charge specified as belonging to a rent-charger in §§ 1213, 1214 *ante*.^(a) And such powers, whether exercised under the statute or by virtue of any other instrument, are not void for perpetuity.^(b)

(a) L.P.A., 1925, s. 121.

(b) *Ibid.* (6).

The remedies conferred by the earlier Act are exercisable in the case of charges created since 1881 ; whether under powers created before that date or since (Conveyancing Act, 1911, s. 6 (2)).

*Liens on
land*

1400. A vendor of land, any part of whose purchase money remains unpaid,^(a) a purchaser of land, who has paid any part of his purchase money but has not obtained a conveyance of the land,^(b) a trustee who has expended his own money on land in necessary repairs or improvements,^(c) and any person who has expended money on the improvement of land, at the request or with the encouragement of the owner thereof, in the reasonable expectation of obtaining an interest therein,^(d) and who has not expressly or by implication waived his lien,^(e) is entitled to a lien

on such land to secure the payment or repayment of such money, with interest at 4 *per cent.*^(f) Such lien operates as an equitable charge on the land,^(g) but not on the title-deeds;^(h) and the person entitled to the benefit of it has the remedies described in §§ 1213, 1214 *ante.*^(j) The benefit of such a lien is transferable.^(k)

- (a) *Hood v. Hood* (1857), 3 Jur. (N.S.) 684.
St. Germans (Earl) v. Crystal Palace Rly. Co. (1871), L.R. 11 Eq. 568.
Lycett v. Stafford & Uttoxeter Rly. Co. (1872), L.R. 13 Eq. 261.
Harding v. Harding (1872), L.R. 13 Eq. 493.
Ecclesiastical Commrs. v. Pinney, [1900] 2 Ch. 736.
- (b) *Wythes v. Lee* (1855), 3 Drew. 396.
Rose v. Watson (1864), 10 H.L.Cas. 672.
Whitbread & Co., Ltd. v. Watt, [1902] 1 Ch. 835.

The last case shows that the purchaser's right is not lost by the fact that he rescinds the contract under an agreement allowing him to do so.

- (c) *Re Aldred's Estate* (1882), 21 Ch. D. 228.
- (d) *Beaufort (Duke) v. Patrick* (1853), 17 Beav. 60.
Unity Joint Stock Mutual Banking Association v. King (1858), 25 Beav. 72.
Laird v. Birkenhead Rly. Co. (1859), John. at p. 511, *per* WOOD, V.C.
Middleton v. Magnay (1864), 2 Hem. & M. 233.
Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699.
- (e) *Mackreth v. Symmons* (1808), 15 Ves. 329.
Winter v. Anson (Lord) (1827), 3 Russ. 488.
Re Brentwood Brick and Coal Co. (1876), 4 Ch. D. 562.

The usual way of relinquishing a lien by implication is by accepting some other security. But this fact is not conclusive.

- (f) *Turner v. Marriott* (1867), L.R. 3 Eq. 744.
Kitton v. Hewett, [1904] W.N. 21.

The costs of any necessary action in which he has been successful may also be added to the lien (*Kitton v. Hewett, ubi supra*).

- (g) *Mackreth v. Symmons, ubi supra.*
Rice v. Rice (1854), 2 Drew. 73.
- (h) *Goode v. Burton* (1847), 1 Exch. 189 (? since the J. Act).
- (j) *Sedgwick v. Watford and Rickmansworth Rly. Co.* (1867), 36 L.J. (Ch.) 379.

It is not quite clear whether the lienor is not entitled to a decree for foreclosure, if he prefers it to a decree for sale (*Unity Joint Stock Mutual Banking Association v. King* (1858), 25 Beav. at p. 81).

- (k) *Unity Joint Stock Mutual Banking Association v. King, ubi supra.*

“Clogging
the equity”

1401. All the charges described in this Title are subject to the restriction specified in § 1389 *ante* (“clogging the equity”).

British South Africa Co. v. De Beers Consolidated Mines, Ltd., [1910] 1 Ch. 354.

The House of Lords ([1912] A.C. 52) held in this case that there was no “clog”. But the general doctrine was admitted; though there were some doubts expressed as to whether it applied to the case of a floating charge.

Charges are
personalty

1402. All the charges described in this Title are personal property;^(a) but a debenture comprising a charge on land creates an interest in land within the meaning of section 40 of the Law of Property Act, 1925.

(a) There can be little doubt, on general principles, that this is the case with regard to ordinary charges. And it was held in *Re Pryce Ex parte Rensburg* (1877), 4 Ch. D. 685, that a debenture was a chose in action, within the meaning of the Bankruptcy Act, 1914, s. 38 (c), and so, presumably, personal estate.

(b) *Driver v. Broad*, [1893] 1 Q.B. 744. (A decision on s. 4, Statute of Frauds.)

For debentures see *post*, §§ 1572–1580. Debenture stock operating as a general charge on the revenue or income of a going corporation is not within the second part of the above rule (*Re Pickard, Elmsley v. Mitchell*, [1894] 3 Ch. 704).

Registration
of charges

1403. The following land charges may be registered under the Land Charges Act, 1925 :

Class A. A rent, annuity, or principal money payable by instalments or otherwise, being a charge (otherwise than by deed) upon land, created after 1888, pursuant to the application of some person.

Class B comprises charges similar to those in Class A except that they are not created pursuant to the application of any person but arise automatically by statute.

Class C is divided into four categories :—

(i) **Puisne mortgages** ; that is, legal mortgages

not protected by a deposit of documents relating to the legal estate affected.

- (ii) A limited owner's charge. This is any equitable charge acquired by a tenant for life or statutory owner under any statute, by reason of the discharge by him of any death duties or other liabilities, and to which the statute gives special priority.
- (iii) A general equitable charge. This means any equitable charge, not included in any other class of land charge, not protected by a deposit of documents relating to the legal estate affected, and not arising or affecting an interest arising under a trust for sale or settlement of land.
- (iv) An estate contract. This is any contract to convey or create a legal estate, such as a contract to grant a legal lease.

Class D. These differ from Class C charges because they are only registrable if created after 1925, whereas Class C charges are registrable if created or conveyed after 1925. There are three categories :—

- (i) Death duties. These consist of any charge acquired by the Inland Revenue Commissioners for death duties arising on a death after 1925, namely, estate duty which is borne by all property and varies according to the total value of the property passing on death ; succession duty, which is borne by all property settled before the death of the deceased, and all land whether settled or not, and legacy duty which is borne by pure unsettled personalty.
- (ii) Restrictive covenants. Any covenant or agreement (not being one made between a lessor

and lessee) restrictive of the user of land, and entered into after 1925.

- (iii) Equitable easements. Any easement, right or privilege over or affecting land which is equitable and created after 1925.

Class E. Annuities created before 1926 which should have been registered in the old Register of Annuities but were not.

Land Charges Act, 1925, s. 10.

*Effect of
non-registra-
tion*

1404. A land charge of Class A created after 1888 is void against a purchaser of the land charged therewith or any interest in the land, unless the land charge is registered before completion of the purchase. A land charge of Class B, C or D created after 1925, is void against a purchaser of the land charged therewith or any interest therein, unless the land charge is registered before completion of the purchase. A land charge of Class D and an estate contract in Class C (iv) created after 1925, is void only against a purchaser of a legal estate for money or money's worth if not registered before completion of the purchase.

Land Charges Act, 1925, s. 13.

Purchaser means any person including a mortgagee or lessee, who for valuable consideration takes any interest in land or in a charge on land (Land Charges Act, 1925, s. 20 (8)). It will be noticed that some charges are void against, (1) a purchaser for value of any interest in the land, and others against, (2) a purchaser for money or money's worth of a legal estate in the land. The difference between (1) and (2) is, that a purchaser of an equitable interest is protected by (1) but not by (2). Further marriage is "value", but is not "money or money's worth". For the other registers, searches and priority notices which are of vital importance in practice, reference must be made to the Land Charges Act, 1925, as amended by the L.P.(Am.) Act 1926.

NOTE ON LOCAL LAND CHARGES.

In addition to the five separate registers kept in the Land Charge Department of the Land Registry in London (Land Charges Act 1925, s. 1, *ante* § 1293 (n)), provision is made for registration b

the clerk of the local authority of "local land charges", i.e. charges acquired by an urban or rural district council or by a county or borough council under such statutes as the Public Health Acts or Private Street Works Act, 1892, such as charges for sanitary work, or for making up a road imposed on those owning land abutting on it, town planning schemes and proceedings for compulsory acquisition under the Town and Country Planning Act, 1944. (Land Charges Act, 1925, s. 15 as amended by L.P. (Am.) A. 1926, Sched.). In the registers kept at the Land Registry the registration is made against the name of the estate owner whose estate is affected, whereas in the local land charges registers, the charges are registered against the land itself and not against the owner of it. The effect of non-registration of a local land charge is to make it void against a purchaser for money or money's worth of a legal estate in the land affected by it who completes before the charge is registered (*ibid.* s. 15 (1)). An official search can be had for local land charges.

The main objects of the registration of incumbrances or third party rights under the Land Charges Act is to facilitate the task of the purchaser in investigating title and to protect those interests from being overreached by the conveyance of the land to a purchaser.

SECTION VI

INVOLUNTARY ALIENATION OF LAND.

TITLE I—BY ADVERSE POSSESSION

*Twelve
years' title*

1405. Subject to §§ 1407–1409 *post*, a person who, or whose predecessors in title,^(a) has or have taken possession of land under the conditions specified in §§ 1108–1113 *ante*, and has or have held it for a period of twelve years^(b) continuously,^(c) acquires the interest in such land of all persons whose title is deemed to be adverse^(d) to his (§ 1109 *ante*) ; except in so far as he is a trustee for any of such persons,^(e) and except in so far as any of such persons is, by reason of any disability, entitled to a longer period in which to substantiate his claim.^(f)

(a) *Asher v. Whitlock* (1865), L.R. 1 Q.B. 1. (And see § 1112 *ante*.)

(b) Limitation Act, 1939, s. 4 (3). (Payment of the whole rent under a lease to the original lessor, after a severance of the reversion of which the lessee has no notice, will not bar the right of the assignee of part of the reversion under s. 9 (3) (*Mitchell v Mosley*, [1914] 1 Ch. 438, C.A.).)

It will be observed that the words of the section merely bar the former owner, without conferring title on the adverse possessor. But the effect of s. 16 of the Limitation Act, 1939, is to extinguish the title of the former owner, and thus to confer title on the possessor, when the title of all rival claimants has been barred (*Re Atkinson's and Horsell's Contract*, [1912] 2 Ch. 1).

(c) *Trustees, Executors and Agency Co., Ltd. v. Short* (1888), 13 App. Cas. 793, P.C.

(d) *Ibid.* s. 10.

(e) Limitation Act, 1939, ss. 7, 19.

(f) Under this head are included the owners of interests which were still *in futuro* when the adverse possession commenced (*ibid.* s. 6). (See *post*, § 1409, and *ante* § 74.)

“Land” includes corporeal hereditaments, tithes (except tithes belonging to a spiritual or eleemosynary corporation sole) and rent charges, and any legal or equitable estate or interest therein, including

an interest in the proceeds of sale of land held upon trust for sale, but save as aforesaid, does not include any incorporeal hereditament. Rent charge means any annuity or periodical sum of money charged upon or payable out of land, except a modus, composition or tithe rent charge belonging to a spiritual or eleemosynary corporation sole or a rent service or interest on a mortgage of land (*ibid.* s. 31 (1)).

1406. Subject to §§ 1407–1409, no action can be brought, or distress or entry made, by any person (other than the Crown or the Duke of Cornwall or a spiritual or eleemosynary corporation sole) to recover any rent charge, but within twelve years after the last receipt of such rent, or written acknowledgment of the right to receive the same.^(a) At the end of such period, the title to the rent passes to the person who has been in adverse receipt of it,^(b) or, if it has not been paid at all, it becomes extinct.^(c) Not more than six years' arrears of rent (whether rent charge or rent service) may be recovered against the land.^(d) *Rent charges*

(a) Limitation Act, 1939, ss. 4 (3), 10 (3), 23, 24, 31 (1) (6).

Rent charges are land for the purpose of limitation (Limitation Act, 1939, s. 31 (1)). The time limit for its recovery is the same as an action for land (*ibid.* ss. 4, 5. (1)); but a rent charge in possession may be barred by mere non-payment without any receipt of the rent by a stranger, and the possession of any land subject to a rent charge by a person (other than the person entitled to the rent charge) who does not pay the rent is deemed to be adverse possession of the rent charge (*ibid.* s. 10 (3), (a)). Time runs from the date of the last receipt of rent (*ibid.* 31 (6)).

(b) Limitation Act, 1939, s. 16.

(c) Limitation Act, 1939, s. 10 (3) (a).

(d) Limitation Act, 1939, s. 17.

Humfrey v. Gery (1849), 7 C.B. 567 (rent charge).

Archbold v. Scully (1861), 9 H.L.Cas. 360 (rent service).

The period for which arrears can be recovered is not enlarged by a covenant to pay the rent charge (*Shaw v. Crompton*, [1910] 2 K.B. 370) (Limitation Act, 1939, s. 2 (3) proviso). Where the title to the hereditament itself is barred by non-receipt of the rent charge for the statutory period, no arrears are recoverable (*Jones v. Withers* (1896), 74 L.T. 572). When the right to the rent is barred, the right to take advantage of an express power of re-entry is barred (*Sykes v. Williams*, [1933] Ch. 285).

Disabilities

1407. Where the owner of an interest in land is under a disability when the right of action accrues, the period is extended to six years from the time when he ceases to be under a disability or dies, whichever first occurs, with a maximum period in the case of land, of thirty years from the date when the right of action accrued to that person or some person through whom he claims.^(a) A person is deemed to be under a disability while he is an infant or of unsound mind or a convict for whom no administrator or curator has been appointed under the Forfeiture Act, 1870.^(b)

(a) Limitation Act, 1939, s. 22.

(b) *Ibid.* s. 31 (2).

A disability which begins after the right of action has accrued does not prevent time from continuing to run against the disabled person. No further time is allowed for a succession of disabilities of different persons. But where there are successive disabilities of the same person the period is extended until both disabilities cease provided there is no interval between them (*ibid.* s. 22).

Corporation sole

1408. No action shall be brought by any spiritual or eleemosynary corporation sole to recover any land after the expiration of thirty years from the date on which the right of action accrued to the corporation sole or, if it first accrued to some person through whom the corporation sole claims, to that person.

Limitation Act, 1939, s. 4 (2). Tithes vested in such corporation sole are excluded from the definition of land, and a modus, composition or tithe rent charge vested in such a person is excluded from the meaning of rent charge (*ibid.* s. 31 (1)).

Future interests

1409. As to the accrual of a right of action to recover land in the case of owners of future interests see § 74 *ante*.

Limitation Act, 1939, s. 6.

Advowsons

1410. No patron shall be entitled to enforce his right of presentation by action after the expiration of one of the following periods, whichever last expires :

) the period during which the benefice has been held by three clerks in succession adversely to the patron or some person through whom he claims ; or (b) a period of sixty years during which there has been such adverse possession ; and in no case after the expiration of one hundred years during which the benefice has been held adversely to the patron.

Limitation Act, 1939, s. 14.

The period applies to all actions to enforce advowsons, whether brought by the Crown, a spiritual or eleemosynary corporation or any other person. After the expiration of the period the title to the advowson is extinguished (*ibid.* s. 16).

1411. An action to foreclose a mortgage of land *Mortgages*, for the purposes of this Title, an action to recover land ;^(a) and where a mortgagor of land has been in possession for twelve years without payment of any part of the principal money or interest, and without acknowledgment in writing, the mortgagee of the land, who is not under a disability, will be barred at the end of twelve years from the time when the mortgage money becomes due.^(b) When a mortgagee of land has been in possession for twelve years,^(c) the mortgagor's action to redeem or any person claiming through him is barred, unless at that date the mortgagor was under a disability.^(d) Where the mortgagee receives any sum in respect of the principal or interest of the mortgage debt, or signs a written acknowledgment of the mortgagor's title, an action to redeem may be brought within twelve years from the payment or acknowledgment.^(e)

(a) Limitation Act, 1939, s. 18 (4).

Heath v. Pugh (1881), 6 Q.B.D. 345 ; *on appeal*, 7 App. Cas. 235.

Harlock v. Ashberry (1882), 19 Ch. D. 539.

(b) *Ibid.* s. 18.

He can even obtain an order against the mortgagee for delivery up of the title-deeds of the mortgaged property which are in his (the mortgagee's) possession (*Lewis v. Plunket*, [1937] Ch. 306).

(c) *Ibid.* s. 12.

(d) *Ibid.* s. 22, in which case an action to redeem may be brought within six years from the date when he ceased to be under a disability or died, whichever event first occurred, subject to a limit or thirty years.

For the effect of acknowledgment by or to one of two or more part-claimants see *ante*, § 70.

(e) *Ibid.* ss. 23 (3); 24.

The effects of acknowledgments of title, and of "concealed fraud", by the possessor of land, on the claims of the person out of possession, are dealt with in §§ 70-72 *ante*.

*Crown
claims*

1412. No action shall be brought by the Crown to recover any land after the expiration of thirty years from the date on which the right of action accrued to the Crown, or if it first accrued to some person through whom the Crown claims, to that person, but an action to recover foreshore may be brought by the Crown at any time before the expiration of sixty years from the said date.^(a) Where the Crown is entitled in remainder on a life interest and the life tenant is out of possession, the Crown has a choice between a period of thirty years from the accrual of the right of action to the life tenant and one of twelve from the falling into possession of the Crown's interest.^(b) Where the right of action first accrued to the Crown, through whom the person bringing the action claims, it may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of twelve years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.^(c) Where land ceases to be foreshore after the right to recover it has vested in the Crown, but remains in the ownership of the Crown, the Crown has sixty years from the accrual of the right or thirty years from the land ceasing to be foreshore, whichever period is the shorter.^(d) Time does not run in favour of a tenant at will of Crown land unless the tenancy has been

determined ; nor can any person obtain a title to such land by wrongful receipt of rent.^(e) The title of the Crown is extinguished when time has fully run against it.^(f)

- (a) Limitation Act, 1939, s. 4 (1). The Crown includes His Majesty in right of the Duchy of Lancaster and s. 4 (1) applies to land of the Duchy of Cornwall s. 30 (3). The prerogative right of the Crown to any gold or silver mines is not subject to any period of limitation, s. 30 (4).
- (b) *Ibid.* s. 6 (2) proviso.
- (c) *Ibid.* s. 4 (3) proviso.
- (d) *Ibid.* ss. 4 (1) proviso, 31 (1).
- (e) *Ibid.* s. 9 (4).
- (f) *Ibid.* ss. 16, 30 (1), 4 (1). On adverse possession in general, see Preston and Newsom *Limitation of Actions*, 2nd Edn.

TITLE II—PRESCRIPTION AND CUSTOM

*Immemorial
user*

1413. Subject to § 1116, *ante*, and § 1415 *post*, any franchise, easement, profit, or rent charge,^(a) which might lawfully have been created by grant,^(b) may be acquired by any person by immemorial user,^(c) without proof of express title.^(d) For the purposes of this doctrine, “immemorial user” means user from the first year of Richard I (1189).^(e)

- (a) A claim to a rent service would, in effect, be a claim to an estate, present or future, in the land; because rent service is always incident to a reversion. And no estate or corporeal hereditament can be claimed by prescription.
- (b) *Abbot of Strata Mercella Case* (1591), 9 Co. Rep. 24 a.
Foxley's Case (1601), 5 Co. Rep. at pp. 109 b, 110 a.
Garner v. Hodgson's Kingston Brewery Co., [1903] A.C. at p. 239,
per Lord LINDLEY.
- (c) As prescription can only be for rights which lie in grant, no vague or unincorporated body, such as “inhabitants”, or “dwellers” can prescribe; because such bodies are incapable of receiving grants (*Constable v. Nicholson* (1863), 14 C.B. (N.S.) 230).
- (d) Co. Litt. 113–115 (generally).

<i>R. v. Talbot</i> (1633), Cro. Car. 311	}	(franchises).
<i>Yarmouth Corpn. v. Eazon</i> (1763), 3 Burr. 1402		
<i>Luttrell's Case</i> (1601), 4 Co. Rep. 86 a	}	(easements).
<i>Popham v. Woolcott</i> (1666), 1 Sid. 291		
<i>Costard's and Wingfield's Case</i> (1588), 2 Leon. 44	}	(profits).
<i>Dickins v. Hampstead</i> (1729), Fitz-G. 87		
<i>Y.B.</i> (1339), 13 Lib. Ass. fo. 39, pl. 4	}	(rents charge).
<i>Stephens v. Lewis</i> (1599), Cro. Eliz. 673		

The reported cases of prescription for rent charge are extremely rare; but it seems to have been assumed in *Finch's Case* (1606), 6 Co. Rep. at p. 65 b, that a rent charge could be prescribed for. The Y.B. case expressly raises the distinction between rent service and rent charge.

- (e) Co. Litt. 115 a.

*Presumption
of lost grant*

1414. Even where immemorial user is not proved, proof of exercise continuous, peaceful, open, and as of right,^(a) for a period of at least twenty years, by the claimant, or his predecessors in title, of such a claim will (subject to § 1116 *ante*) raise a presumption that

e right claimed was granted to the claimant or his edecessor in title, by a person lawfully entitled to like such grant.^(b)

- (a) *Monmouth Canal Co. v. Harford* (1834), 1 Cr.M. & R. 614 (interrupted).
Eaton v. Swansea Waterworks Co. (1851), 17 Q.B. 267 (contentious).
Dalton v. Angus (1881), 6 App. Cas. at p. 812, *per* Lord BLACKBURN (generally).
Burrows v. Lang, [1901] 2 Ch. 502 (permissive).
Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557 (secret).
- (b) *Bright v. Walker* (1834), 1 Cr.M. & R., at pp. 217-18, *per* PARK, B.
Bryant v. Lefever (1879), 4 C.P.D. at p. 177, *per* BRAMWELL, B.; approved in
Dalton v. Angus (1881), 6 App. Cas. at p. 816, *per* Lord BLACKBURN.
Haigh v. West, [1893] 2 Q.B. 19.
Layzell v. Thompson (1927), 96 L.J. Ch. 332, C.A.

In *Haigh v. West* (subsequently referred to with approval by JENS-HARDY, J., in *Brown v. Dunstable Corpn.*, [1899] 2 Ch. 387) the presumption was raised in favour of a claim of a cor- al hereditament. But the general doctrine was fully admitted.

1415. (Probably) direct evidence may not be *Evidence to rebut* luced to show that no grant such as that described § 1413 was in fact made.^(a) But the presumption a lost grant will not be raised if there is anything the circumstances of the case which would make h a grant impossible,^(b) or unlawful,^(c) or incon- ent with a lawful custom,^(d) or where the user ed on is capable of other explanation.^(e)

- a) On this point there seems to be much difference of opinion. See the views of the different judges and learned lords in the various stages of *Angus v. Dalton* (1877), 3 Q.B.D. at p. 130; *reversed* (1878), 4 Q.B.D. at pp. 172, 183, 187, 201; *affirmed*, *Dalton v. Angus* (1881), 6 App. Cas. at pp. 765, 783, 812. The older view clearly was that the presumption of the lost grant could be rebutted (see notes to *Yard v. Ford* (1670), 2 Saund. 172).
- b) E.g. where the presumed grantor or the presumed grantee was incapable of making or receiving such a grant (*Barker v. Richardson* (1821), 4 B. & Ald. 579 (rector); *A.-G. v. G.N. Rly. Co.*, [1909] 1 Ch. at p. 778, *per* NEVILLE, J. (corporation); *National Guaranteed Manure Co. v. Donald* (1859), 4 H. & N. 8 (corporation)).
- c) E.g. as being contrary to a public Act of Parliament (*Neaverson v. Peterborough R. Council*, [1902] 1 Ch. 557); or creating a public nuisance (*Mott v. Schoolbred* (1875), L.R. 20 Eq. 22).

(d) *Perry v. Eames*, [1891] 1 Ch. at p. 667, *per* CHITTY, J.

(e) *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48.

A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

*Prescriptive
rights per-
petual*

1416. A right acquired by prescription is perpetual.

Wheaton v. Maple & Co., *ubi supra*.

Kilgour v. Gaddes, [1904] 1 K.B. 457.

*Appendant
rights*

1417. Appendant rights (*ante*, § 1118) cannot be claimed by prescription.

Pill v. Towers (1600), Cro. Eliz. 791. The reason is, that appendant rights are not supposed to have arisen by grant.

*Prescription
against the
Crown*

1418. (*Semble*) a claim by prescription can (subject to § 1415) be enforced against the Crown, even apart from statute, if the circumstances warrant the presumption of immemorial user or a lost grant.

Wheaton v. Maple & Co., [1893] 3 Ch. 48.

This seems to be the true view ; in spite of the *dicta* of text book writers. Indeed, it is difficult to see how, on any other view franchises could have been acquired by prescription. There is a well-known exception in the case of claims to light under the Prescription Act, 1832 (*post*, § 1425).

Non-user

1419. A right to an easement or profit, once acquired by prescription or otherwise, cannot be lost by mere non-exercise without abandonment.

Co. Litt. 114 b.

Nowell v. Hicks (1601), cited *ibid*.

Crossley & Sons, Ltd. v. Lightowler (1867), 2 Ch. App. at p. 482, *per* Lord CHELMSFORD, L.C.

No fixed period of non-user is required to prove abandonment. Such period is only material as one element from which the dominant owner's intention to retain or abandon his easement may be inferred. There is no hard and fast rule that twenty years non-user raises presumption of abandonment.

*Presumption
under the
Prescription
Act*

1420. Independently of the presumption of immemorial user or a lost grant, when any easement (other than access of light to a building),^(a) of a kind

recognized by law, has been actually enjoyed by a person claiming right thereto, without interruption during at least a year,^(b) for a period of twenty years next before the commencement of some action in which such right has been brought in question,^(c) such claim cannot be defeated, even by the Crown or the Duke of Cornwall, merely by showing that such easement was first enjoyed at a time prior to such twenty years.^(d) A similar rule holds when a similar actual enjoyment of any profit *à prendre* appurtenant^(e) (other than rent, services, or tithe rent charge) has existed for thirty years.^(f) Enjoyment for a shorter period raises no presumption in favour of the claim.^(g)

(a) *Perry v. Eames*, [1891] 1 Ch. 658.

Wheaton v. Maple & Co., [1893] 3 Ch. 48.

These cases definitely decided that s. 3 of the Prescription Act, 1832 (right to light), does not apply to claims against the Crown.

(b) Prescription Act, 1832, s. 4. No act is to be deemed an interruption until it has been submitted to or acquiesced in for one year after the party interrupted had notice both of the interruption and of the person making it, or authorising it to be made.

The interruption, to be effective, must be adverse and acquiesced in, i.e. the attention of the person claiming the easement or profit must have been directed to the adverse character of the interruption; this is a question of fact, and in order to disprove acquiescence it is not necessary to take proceedings or remove the obstruction. (*Glover v. Coleman* (1874), L.R. 10 C.P. 108; *Seddon v. Bank of Bolton* (1882), 19 Ch. D. 462). Where an easement has been enjoyed without interruption for nineteen years and one day, interruption before the completion of the period of twenty years will not prevent title to the easement being acquired under the Act, provided that an action claiming the right is commenced within a year after notice of the interruption (*Flight v. Thomas* (1841), 8 Cl. & Fin. 231). An interruption short of the statutory period may qualify the nature of the easement claimed (*Rolle v. Whyte* (1868), L.R. 3 Q.B. 286, 302). Until the full period of twenty years has expired the inchoate right is not an interest in land nor an easement known to the law (*Greenhalgh v. Brindley*, [1901] 2 Ch. 324, 328) and the Court will not interfere to protect it, until that period has expired (*Battersea (Lord) v. London City Sewers Commissioners*, [1895] 2 Ch. 708).

(c) Prescription Act, 1832, s. 4.

- (d) *Ibid.* s. 2. Such claim may be defeated in any other way in which it was liable to be defeated at the time when the Act was passed.
- (e) *Shuttleworth v. Le Fleming* (1865), 19 C.B. (N.S.) 687, laid it down that profits in gross are not within the scope of the Prescription Act.
- (f) Prescription Act, 1832, s. 1.
- (g) *Ibid.* s. 6.

The enjoyment must be open, notorious, and as of right (*Lyell v. Hothfield* (Lord), [1914] 3 K.B. 911), i.e. *nec vi, nec clam nec precario*.

*Absolute
title under
the Act*

1421. When an easement of the kind described in § 1420 has been enjoyed in the manner described in such paragraph, for a period of forty years calculated as described in the said paragraph, or when a profit of the kind described in such paragraph has been taken in such manner for a period of sixty years so calculated, the right thereto is deemed absolute and indefeasible; unless it appears that such easement or profit was enjoyed or taken by express consent or agreement by deed or writing.

Prescription Act, 1832, ss. 1, 2.

The consent or agreement need not be signed by the owner of the alleged servient tenement, one signed by the dominant owner was sufficient in *Bewley v. Atkinson* (1879), 13 Ch. D. 283. Signature by a tenant of the dominant tenement was sufficient in *Hyman v. Van den Bergh*, [1907] 2 Ch. at p. 531. (See *Foster v. Lyons & Co. Ltd.*, [1927] 1 Ch. 219, distinguishing *Mitchell v. Cantrill* (1887), 37 Ch. D. 56.) *Quære*: Would an agreement not inconsistent with the claim deprive the claimant of the protection of the statute? As to the effect of an oral or written permission given before the periods of twenty and forty years, and an oral permission given during the periods, see *Gale, Easements*, 11th Ed. 243, and *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A.C. 229, at pp. 232, 236, 239.

*Common
landlord*

1422. Subject to § 1426, no person can acquire an easement by virtue of enjoyment or taking as against a lessee whose lessor is also lessor of the tenement occupied by the claimant and his predecessors in title, in respect of which such right is claimed.

Gayford v. Moffatt (1868), 4 Ch. App. 133.
Kilgour v. Gaddes, [1904] 1 K.B. 457.

Such a claim would, in effect, be a claim of adverse enjoyment against the claimant's own lessor, which is contrary to the principle of tenure (*Gayford v. Moffat*, *ubi supra* at p. 135, *per* Lord CAIRNS, C.).

1423. In cases of claims under § 1420 *ante* (but *Disabilities* not of claims under § 1425 *post*), the time during which the person entitled to resist the claim is an infant, idiot, *non compos mentis*, *feme covert*,^(a) or tenant for life,^(b) or during which any action (? involving title to the alleged servient tenement) has been diligently prosecuted,^(c) is excluded in computing the periods referred to in such paragraph ;^(d) and enjoyment or taking interrupted only by such disabilities will be deemed continuous.^(e)

- (a) As regards a *feme covert*, this section is in effect repealed by the Married Women's Property Act, 1882, in cases to which that Act applies (*Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. 268). The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, does not appear to contemplate the point.
- (b) Unless the provisions of the next paragraph are held (contrary to the express words of s. 8) to apply to all claims (other than claims to light) under the Act, there would seem to be a gross omission here in respect of profits *à prendre* claimed by virtue of enjoyment against tenants for years. In prescription at the common law, enjoyment against a lessee for years was ineffectual ; because such lessee could not have granted a right which would have bound his lessor.
- (c) Some restriction must be applied to the vague words of the Prescription Act. But it is difficult to know whether the action referred to is supposed to have been an action to contest the claim in question, or an action involving title to the servient tenement.
- (d) Prescription Act, 1832, s. 7.
- (e) *Clayton v. Corby* (1842), 2 Q.B. 813. (But a *de facto* interruption by the person under disability breaks the continuity of the enjoyment by the claimant (*ibid.* at p. 825, *per* Lord DENMAN, C.J.).)

1424. When the servient tenement in respect of *Leases* which a claim to a "way or other convenient water-course or use of water" is put forward under the Prescription Act, 1832, has been held for any term of life or any term of years exceeding three from the granting thereof, the time of enjoyment of such "way or other matter" during the continuance of

such term will be excluded in the computation of the period of forty years described in § 1420 *ante*, in case the claim is resisted by a reversioner (but not remainderman)^(a) expectant on the determination of such term within three years from the determination thereof.^(b)

- (a) *Laird v. Briggs* (1881), 19 Ch. D. at p. 30, *per* JESSEL, M.R.
Symons v. Leaker (1885), 15 Q.B.D. 629.

- (b) Prescription Act, 1832, s. 8.

The wording of s. 8 is even more open to criticism than that of the other sections of the Prescription Act. It has been suggested (*Laird v. Briggs*, *ubi supra*, at p. 33) that the word "convenient" in line 2 of the paragraph should read "easement"; but this change would hardly make the section a model of the draftsman's art; and the point has been expressly left open by the C.A. (*ibid.*) The suggestion of MANISTY, J., in *Symons v. Leaker*, *ubi supra*, p. 634, to the effect that s. 8 applies to claims of light under s. 1, seems wholly inconsistent with the wording of s. 8, which refers exclusively to "the said period of forty years". In *Palk v. Shim* (1852), 18 Q.B. 568, it was held that the provision in s. 8, as to the exclusion of leases has no application to a twenty years' prescription. See *Gale op. cit.* 219 n.

Claims of light

1425. Where the access of light to a building has been actually enjoyed therewith^(a) for the full period of twenty years without interruption, calculated according to the period described in § 1420 *ante*,^(b) the right thereto is (subject to § 1175 *ante*)^(c) deemed absolute and indefeasible except as against the Crown and its tenants;^(d) unless it appears that the same was enjoyed by some consent or agreement expressly made or given by deed or writing.^(e)

- (a) Enjoyment as of right is not necessary, if the permission does satisfy the requirements of the section (*Bewley v. Atkinson* (1871) 13 Ch. D. at p. 296, *per* THESIGER, L.J.; *Hyman v. Van den Bergh* [1907] 2 Ch. at p. 530, *per* PARKER, J.).
- (b) Prescription Act, 1832, s. 4.

Hyman v. Van den Bergh, [1908] 1 Ch. 167. It has been held, however (*Simper v. Foley* (1862), 2 John. & H. 555; *Ladyman v. Grace* (1871), 6 Ch. App. at p. 768, *per* Lord HATHERLEY, C.) that when the enjoyment has been suspended by unity of possession, enjoyment prior to the suspension may be added

the period immediately following its removal. But see these cases criticized by FARWELL, L.J., and PARKER, J., in *Hyman v. Van den Bergh*, *ubi supra*.

- (c) I.e. only a reasonable quantity of light can be obtained. (See § 1174, n., *ante*, for details.)
- (d) *Perry v. Eames*, [1891] 1 Ch. 658.
Wheaton v. Maple & Co., [1893] 3 Ch. 48.
- (e) Prescription Act, 1832, s. 3.
Willoughby v. Eckstein (No. 2), [1937] Ch. 167. (The consent or agreement need not be signed by the owner of the alleged servient tenement (*Bewley v. Atkinson*, *ubi supra*). The occupier actually enjoying the access of light, or the use of the dominant tenement, is the only person whose consent or agreement in writing can be effectual to prevent the acquisition of light, not casual occupants. He need not be the owner in fee simple; the consent of a disseisor during his occupation is effective (*Hyman v. Van den Bergh*, *supra per FARWELL*, L.J., at p. 179).)

A dominant owner cannot increase the burden on the servient tenement by making alterations in his own tenement during the period of prescription (*Smith v. Evangelization Socy. (Incorporated Trust*, [1933] Ch. 515, C.A.).

1426. A claim of light under § 1425 can be maintained, even though, during the whole of the alleged period of enjoyment, the servient tenement has been in the occupation of a lessee of the person who is also owner in fee of the tenement to which he right is claimed as appurtenant. *Even against common landlord*

Morgan v. Fear, [1907] A.C. 425.

Richardson v. Graham, [1908] 1 K.B. 39.

A fortiori, the right can be secured by enjoyment against the lessee of a stranger (*Simper v. Foley* (1862), 2 John. & H. 555).

1427. A claim of light may be maintained under § 1425, notwithstanding that it is inconsistent with a local usage or custom. *Local custom*

Prescription Act, 1832, s. 3.

Thus, for example, it overrides the custom of London, to the effect that the owner of an ancient building may pull it down and erect another of any height, notwithstanding any claim of light by a neighbour (*Salter's Co. v. Jay* (1842), 3 Q.B. 109; *Truscott v. Merchant Tailors' Co.* (1856), 11 Exch. 855).

1428. An immemorial custom, which will create *Proof of custom*

a right over land of the kind described in §§ 1221 1223 *ante*, may be proved by evidence showing usage long,^(a) continuous,^(b) and peaceable, and not explained by causes inconsistent with the existence of the alleged custom.^(c) (*Semble*) the Prescription Act 1832, has no application to proof of such custom.^(d)

- (a) The period suggested by the cases is at least fifty years, i.e. the average memory of the oldest inhabitant (*Hammerton v. Honey* (1876) 24 W.R. at p. 604, *per* JESSEL, M.R.).

In *Brocklebank v. Thompson*, [1903] 2 Ch. at p. 350, JOYCE, J. suggested that twenty years might be sufficient; and he referred to *R. v. Foliffe* (1823), 2 B. & C. 54. But *R. v. Foliffe* was not a case of rights over land.

- (b) *Bastard v. Smith* (1838), 2 Mood. & R. at p. 136, *per* TINDAL, C. *Hammerton v. Honey*, *ubi supra*.
Mercer v. Denne, [1905] 2 Ch. 538.
 (c) *Simpson v. Wells* (1872), L.R. 7 Q.B. 214.
 (d) *Mounsey v. Ismay* (1865), 3 H. & C. 486.
Shuttleworth v. Le Fleming (1865), 19 C.B. (N.S.) 687.

The view of the Court in these cases was, that rights in gross were not contemplated by the framers of the Prescription Act. But might not appurtenant rights be claimed by custom? And, whether this be so or not, the view of the Courts which decided the two last mentioned cases has been questioned by the Court of Appeal (*Mercer v. Denne*, *ubi supra* at p. 586). Probably, customary rights are not alienable.

TITLE III—BANKRUPTCY

1429. Upon an adjudication in bankruptcy, all the property beneficially owned by the bankrupt including the capacity to exercise for his own benefit any power of disposition other than the nomination to a vacant ecclesiastical benefice^(a) passes to his trustee in bankruptcy^(b) and the title of the trustee, subject to the claims of *bonâ fide* purchasers for value without notice of an available act of bankruptcy before the date of the receiving order,^(c) relates back to the commencement of the bankruptcy.^(d) All property and powers, of the kind above described, acquired by the bankrupt prior to his discharge, likewise pass to the trustee, in manner and subject to the exceptions specified in § 1433 *post.*^(e)

*Adjudication
in bank-
ruptcy*

(a) Bankruptcy Act, 1914, s. 38 (b).

All property held by the bankrupt as trustee for other persons is expressly excepted by the Act (s. 38 (1)). There is some doubt whether the section covers special powers of appointment. It has been held not to apply to a release of such a power (*Re Rose, Rose v. Rose*, [1904] 2 Ch. 348). But the order was discharged on appeal, by consent, on the ground that all parties were not represented (*Re Rose, Rose v. Rose*, [1905] 1 Ch. 94).

(b) Bankruptcy Act, 1914, s. 18 (1).

Upon the making of the receiving order, the property is placed under the control of an official receiver, and the remedies which creditors normally possess against a debtor are suspended (*ibid.* s. 7).

(c) Bankruptcy Act, 1914, s. 45.

Probably the protection of this section is not confined to purchasers who take directly from the bankrupt (*Re Slobodinsky, Ex parte Moore*, 1903] 2 K.B. at p. 532, *per* WRIGHT, J.). It certainly is not so confined in the case of a voluntary settlement, sought to be set aside under s. 47 of the Act (*Re Hart, Ex parte Green*, [1912] 3 K.B. 6); though in that case there is no express saving to that effect in the section.

(d) Bankruptcy Act, 1914, s. 37 (1). (By this section, the commencement of the bankruptcy is to be deemed to be the committing of the act of bankruptcy upon which the receiving order was made,

or, if the bankrupt has committed more acts of bankruptcy than one, then the first within three months prior to the presentation of the bankruptcy petition.)

(e) *Ibid.* s. 38 (a).

*Disclaimer
of onerous
property*

1430. Any lease or other interest in land burdened with onerous covenants, belonging to the bankrupt, and any property of the bankrupt that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, may be disclaimed in writing by the trustee at any time within twelve months after the first appointment of a trustee (in that bankruptcy),^(a) or, if the existence of such interest has not come to the knowledge of the trustee within one month after such appointment, then, within twelve months after he first became aware thereof.^(b) But a trustee in bankruptcy may not—

- (i) disclaim any lease, otherwise than in accordance with General Rules made under the Bankruptcy Acts, without the leave of the Court ; and the Court may, before granting leave, impose such conditions and make such orders as it thinks just ;^(c)
- (ii) disclaim any property, when an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the trustee has, for a period of twenty-eight days after receipt of the application (or such extended period as may be allowed by the Court), failed to give notice whether he disclaims or not.^(d)

(a) The words in brackets are not in the Act ; but, presumably, they must be implied.

(b) Bankruptcy Act, 1914, s. 54 (1). (The Court may extend the period.)

- (c) *Ibid.* (3). The effect of rule 276 of the Bankruptcy Rules, 1914, is, that a lease may be disclaimed without leave when (i) the premises have not been sublet or mortgaged by the bankrupt, and *either* the rent and value of the premises as assessed for property tax are less than £20 a year, *or* the estate is administered as a "small bankruptcy" under s. 129, *or* the trustee gives notice to the lessor of his intention and the lessor does not, within seven days, give a counter-notice requiring the matter to be brought before the Court; or when (ii) the bankrupt has sublet or mortgaged, and neither the lessor nor the sublessee or mortgagee, after fourteen days' notice, requires the matter to be brought before the Court. In other cases, a disclaimer without leave is void (R. 276 (2)).
- (d) *Ibid.* s. 54 (4).

1431. A disclaimer under § 1430 operates to extinguish the rights, interests, and liabilities of the bankrupt in respect of the property disclaimed, as from its date, and to discharge the personal liability of the trustee as from the date when the property vested in him; but not otherwise to affect the rights or liabilities of other persons.

Bankruptcy Act, 1914, s. 54 (2).

Re Thompson and Cottrell's Contract, [1943] Ch. 97 at p. 99.

Of course all parties injured by the disclaimer may prove against the estate of the bankrupt to the extent of such injury (*ibid.* s. 54 (8)).

1432. The Court may, on application by any person interested in, or remaining affected by, any liability in respect of the property disclaimed, vest the property in any person entitled thereto, on such terms, as the Court may think just. But where the property is of a leasehold nature, the Court may not vest it in any person claiming under the bankrupt, except upon the terms of making such person liable to perform the obligations which were incumbent on the bankrupt in respect of such property at the time of the presentation of the bankruptcy petition, or to perform the obligations which would have been incumbent on that person, had he been an assignee of the lease at that date.

Bankruptcy Act, 1914, s. 54 (6).

Any mortgagee or sub-lessee of the bankrupt refusing to accept a vesting order in such terms, may be excluded from all interest in the property, which may then be vested in any person liable on the lessee's covenants, freed from all interests therein created by the bankrupt (*ibid.*).

*Property
divisible
amongst
creditors*

*After
acquired
property*

1433. An undischarged bankrupt may acquire property and enter into contracts. But his rights, not being rights arising from purely personal services or injuries to his person or character, may be claimed by his trustee at any time for the benefit of his creditors;^(a) and real property (other than advowsons, dignities and offices) acquired by an undischarged bankrupt, passes to his trustee without express claim.^(b) But all transactions by a bankrupt with any person dealing with him *bonâ fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after adjudication, if completed before intervention by the trustee, are valid against the trustee.^(c)

(a) Bankruptcy Act, 1914, ss. 37, 38, 55.

Re Graydon, Ex parte Official Receiver, [1896] 1 Q.B. 417. (A bankrupt, against the trustee, the bankrupt will only be able to retain so much of the proceeds of his personal earnings as will suffice for the maintenance of himself and his family.)

(b) *Re Wilson, Ex parte Vine* (1878), 8 Ch. D. 364.

Re New Land Development Association and Gray, [1892] 2 Ch. 138.
Re Clayton and Barclay's Contract, [1895] 2 Ch. 212.

(c) Bankruptcy Act, 1914, ss. 47, 53.

It will be observed that the provisions of the Bankruptcy Act though they affect the consequences of the distinction between real and personal property set up by *Cohen v. Mitchell* (1890), 25 Q.B.D. 262, and *Re New Land Development Association and Gray* (*supra*), do not abolish it entirely. It must be remembered also that, generally speaking, the title of the trustee relates back to the earliest act of bankruptcy committed by the bankrupt within three months before the presentation of the petition on which the adjudication is founded (Bankruptcy Act, 1914, s. 37). But a purchaser of a legal estate in land in good faith and for money or money's worth, without notice of an available act of bankruptcy, is not affected by notice of the petition unless it has been registered as a pending action and the registration is still in force, or the receiving order is duly registered in the register of writs and orders affecting land at the date of the conveyance.

(Land Charges Act, 1925, s. 3 (3)). Even if the petition and receiving order are registered, a purchaser of after acquired property appears to acquire a good title ; for, though registration gives him notice, notice is immaterial ; provided the transaction is *bonâ fide* and for value, it is binding on the trustee although the purchaser had notice of the bankruptcy (*Dyster v. Randall & Sons*, [1926] Ch. 932, at p. 940).

TITLE IV—EXECUTION FOR DEBT

*Effect of
judgment*

1434. A judgment entered up in the Supreme Court binds all present and future interests in land belonging to the judgment debtor, including entailed interests, by way of equitable charge; and such interests can be taken in execution and realized to satisfy the judgment.^(a) But such judgment will not operate as a charge on the land until it has been registered in the Register of Writs and Orders at the Land Registry.^(b)

(a) L.P.A., 1925, s. 195 (1), (2).

(b) *Ibid.* (3). L.C.A., 1925, s. 6.

The origin of the remedy of the judgment creditor against his debtor's lands is the Statute of Westminster II, which enabled him to elect either to have a writ of *fieri facias* against the debtor's goods, or that the sheriff should deliver to him "all the chattels of the debtor (saving only his oxen and beasts of the plough) and one half of his lands until the debt be levied upon a reasonable price and extent". The writ is still called a writ of *elegit*. A series of statutes, the Judgment Acts, 1838, 1839, 1840, 1864, and judicial decisions have since modified the law, and important changes have been made by the Land Charges Act, 1925, s. 6, and the Law of Property Act, 1925, s. 195. The present position is that judgments are enforceable against the debtor's land, or such of them as are of an extendible nature, by means of a writ of *elegit*. Every legal estate in land in possession or reversion if vested in the debtor beneficially is extendible at law, but not an interest in remainder. When the debtor's interest consists of an equitable interest, not extendible at law, but which had it been a legal estate would have been so extendible the court may, at the suit of the creditor appoint a receiver. This gives him a remedy analogous to that of a legal execution. The writ of *elegit* is issued by the Central Office and sent to the sheriff of the county in which the land is to be executed. The bailiff with a sworn jury inquires what land the debtor has, and then values it (i.e. extend). A description of the land with a statement of its annual value is made in a formal document, called an inquisition; this constitutes the return of the writ, and is filed at the Central Office. When the extension is made, the creditor holds the land as tenant by *elegit* until the debt is paid out of the rents and profits. The effect of the return is that the right to possession vests in the creditor, but he may apply to the Court of Chancery for a sale of the land instead of entering into possession.

1435. No recognizance or Crown debt affects any *Crown debts* land ; until and unless a writ or order for the purpose of enforcing it is registered in the Register of Writs and Orders at the Land Registry. .

L.P.A., 1925, s. 195 (4).

TITLE V—FORFEITURE

Disclaimer **1436.** Any legal interest in land may be forfeited by disclaimer, on the part of the tenant, of the lord's title, in manner, and subject to the reservations, contained in § 1037 (iii) *ante*.

Breach of condition **1437.** Any interest in land may be forfeited by breach of express condition, in manner, and subject to the restrictions, described in §§ 1325–1339 *ante*.

Mortmain **1438.** An unlawful conveyance to a corporation in mortmain (*ante*, § 27) works a forfeiture to the Crown of the interest conveyed, subject to the rights of mesne lords (if any), but does not affect any rent or service due in respect of such interest.

Mortmain and Charitable Uses Act, 1888, ss. 1, 3.

The theory is, that an unlawful assurance in mortmain works a forfeiture to the immediate lord ; and, until the passing of the 7 & 8 Will. III (1696), c. 37, the licence of the Crown alone was not sufficient to authorize the assurance. But owing to the operation of the statute *Quia Emptores* (*ante*, § 1269, n.), it is, in most cases, impossible to identify the mesne lords of a freehold fee simple ; and the Crown takes in default of claim by mesne lords. The rights of the latter are specified in subs. 2 of s. 1 of the Act of 1888. Alienation of land for charitable purposes, which does not work a forfeiture, is dealt with under §§ 1803–1808 *post*.

Simony **1439.** Any bargain concerning an advowson or next presentation to an ecclesiastical benefice, made with a view of procuring a corrupt nomination to the benefice, works a forfeiture of the next presentation to the Crown.

31 Eliz. (1589), c. 6, s. 4.

R. v. Oxford (Bishop) (1806), 7 East, 600.

Most of the merely technical forms of simony, which grew up from the interpretation of the Elizabethan statutes, have ceased to exist as the result of the passing of the Benefices Act, 1898 (*ante*, §§ 1202–1205). But it is conceived that actually corrupt bargains still entail the old penalty.

SECTION VII

STATUTORY POWERS OF LIMITED OWNERS OF LAND.

1440. A tenant for life,^(a) or a person having^(b) *Powers of* or entitled to exercise the powers of a tenant for life,^(c) *tenant for* as defined in § 1445, has, with regard to settled *life* land, as defined in § 1441, but subject as explained in this Section, the following powers of disposition and management with regard to such land, viz. :—

S.L.A. s. 38.

(a) S.L.A. s. 19. The expression tenant for life in the Act includes a person (not being a statutory owner) who has the powers of a tenant for life under s. 20 (S.L.A. s. 117 (1) (xxviii)).

(b) S.L.A. s. 20.

(c) The persons entitled to exercise the powers of a tenant for life (ss. 23, 26 S.L.A.) are known as "statutory owners," namely, the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life, have the powers of a tenant for life under the Act, but they do not include the trustees of the settlement, where by virtue of an order of the Court or otherwise the trustees have power to convey the settled land in the name of the tenant for life (S.L.A. s. 117 (1) (xxvi)).

(i) a power to sell or exchange the settled land, or any part thereof, including mines and minerals, or to sell any chattels (*post*, § 1453) settled therewith, or any easement, right, or privilege of any kind, over or in relation to such land, for the best price that can reasonably be obtained ;

S.L.A. ss. 39, 40, 50, 67.

(ii) a power to grant leases of the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation

to the land, for any purpose whatever, whether involving waste or not, for any term not exceeding—

- (a) in case of a building or forestry lease, 999 years ;
- (b) in case of a mining lease, 100 years ;
- (c) in case of any other lease, 50 years.

S.L.A. s. 41.

Longer terms, or leases in perpetuity, may be authorized by the Court in the case of building or mining leases (*ibid.* s. 46). For details of leasing powers see ss. 42–48.

- (iii) a power to accept, with or without consideration, a surrender of any lease of settled land, whether made under the S.L.A. or not, or a re-grant of any land granted, in fee simple, whether under the S.L.A. or not, in respect of the whole land leased or granted, or any part thereof, with or without exception of any mines or minerals therein, or in respect of any mines or minerals, and with or without an exception of any easement, right, or privilege of any kind over or in relation to the land surrendered or re-granted ;

S.L.A. s. 52.

- (iv) a power to accept a lease of any land, or of any mines or minerals, or of any easement, right, or privilege, convenient to be held or worked with the settled land, or any part thereof, on such terms and conditions as he thinks fit, except that no fine in respect of such lease may be paid out of capital money ;

S.L.A. s. 53.

- (v) a power, with the consent of the trustees of the settlement or under an order of the

Court, to cut timber growing on the settled land, ripe and fit for cutting ;

S.L.A. s. 66 (1).

Naturally, this power is only required by the tenant for life who is "impeachable for waste" (*ante*, § 1251). A tenant "without impeachment" has, as a matter of course, power to cut timber (other than ornamental or protective timber) without accounting for the proceeds (*ante*, § 1251). When the tenant for life relies on the above statutory power, three-fourths of the proceeds must be set aside as capital money (*ibid.* s. 66 (2)).

- (vi) a power to make, out of capital moneys subject to the settlement, and in manner and subject to the safeguards prescribed by the Settled Land Act, improvements, of a kind authorized by statute, on, or in connexion with, and for the benefit of (the persons interested in) the settled land ;

S.L.A. s. 71.

- (vii) a power to mortgage the settled land or any part thereof, to raise money for any of the following (amongst other) purposes, viz. :
 - (a) extinguishment of manorial incidents (affecting any part of the settled land) ;

S.L.A. s. 71 (1) (iv).

The words in brackets are not in the section, but, presumably, are implied.

- (b) equality of exchange ;

S.L.A. s. 71 (1) (iii).

- (c) payment of the costs of any transaction authorized by this paragraph ;

S.L.A. s. 71 (1) (ix).

- (d) discharge of any incumbrance on the settled land or part thereof, including any annual sum payable only during a life or lives, or during a term of years absolute or determinable ;

S.L.A. s. 71 (1) (i).

- (e) payment for any improvement authorized by the Settled Land Act or the settlement.

S.L.A. s. 71 (1) (ii).

- (viii) a power to grant by writing, with or without consideration, options to purchase or take leases of the settled land, or any part thereof, or any easement, right, or privilege over or in relation to the same, at a price or rent fixed at the time of granting the option.

S.L.A. s. 51.

Numerous conditions, as to the form and otherwise under which these various powers must be exercised, are imposed by the Settled Land Act, but are too lengthy to be set out here. It is to be observed, however, that, generally speaking, a purchaser or other person dealing in good faith with the tenant for life, is to be deemed to have given the best price, consideration, or rent, that could reasonably have been obtained by the tenant for life, and to have complied with all the requisitions of the Act (S.L.A. s. 110). In addition to what may be called "self-regarding" powers, the tenant for life has powers to facilitate, at the expense of the estate, certain public, and even charitable, schemes (*ibid.* ss. 55-7).

"Settlement"

1441. A "settlement", for the purposes of this Section, includes any instrument or instruments, whenever executed or made, whereby any land, or any estate or interest in land (not held on trust for sale),^(a) for the time being stands limited (i) in trust for any persons by way of succession,^(b) or (ii) in trust for any person in possession for an entailed interest, or for an estate in fee simple or term of years absolute subject to an executory limitation over (*ante*, § 1312 (n)) on failure of his issue or in any other event, or for a base or determinable fee or any corresponding interest in a term of years, or, being a minor, for an estate in fee simple or for a term of years absolute, or (iii) in trust for any person for an estate in fee simple or for a term of years absolute, contingently on the happening of any event, or (iv) to, or in trust for a married woman in possession for an estate in fee simple or a term of

years absolute or any other interest subject to a restraint on anticipation^(c) (*ante*, § 44) ; or (v) charged, whether voluntarily or by way of family arrangement or in consideration of marriage, with the payment of any rent charge for the life of any person or any less period, or of any sums for the portions, advancement, or maintenance of any persons.^(d) And "settled land" means any interest in land which is or is deemed to be the subject of such an instrument or instruments, including any estate or interest not disposed of by a settlement and remaining in or reverting to the settlor or any person deriving title under him.^(e)

(a) S.L.A. s. 117 (1) (ix), s. 1 (7) as inserted by L.P.(Amendment)A., 1926 Sched.

(b) *Ibid.* s. 1 (i).

(c) *Ibid.* s. 1 (ii), (iii), (iv).

(d) *Ibid.* (v).

There are a number of cases in which for the purposes of the Act, land is deemed to be the subject of a settlement (*ibid.* s. 1 (3), (4), (5), (6)).

(e) *Ibid.* s. 2.

Every settlement *inter vivos* after 1925 of a legal estate in land must be effected by two instruments: (i) a vesting deed, and (ii) a trust instrument, and if effected in any other way shall not operate to create or transfer a legal estate (s. 4 (1)). The vesting deed, (i) describes the settled land, either specifically or generally, (ii) states that the settled land is vested in the person or persons to whom it is conveyed, or in whom it is declared to be vested, upon the trusts from time to time affecting the land, (iii) states the names of the trustees of the settlement, (iv) states any additional or larger powers conferred by the trust instrument in extension of those conferred by the Act, (v) states the names of any persons empowered to appoint new trustees of the settlement (s. 5). The trust instrument, (i) declares the trusts affecting the settled land, (ii) appoints or constitutes trustees of the settlement, (iii) contains power, if any, to appoint new trustees, (iv) sets out, either expressly or by reference, any powers intended to be conferred by the settlement in extension of those conferred by the Act, (v) bears any *ad valorem* stamp duty payable in respect of the settlement (s. 4 (3)). When a settlement is created by the testament of an estate owner who dies after 1925, the testament is the trust instrument, and the place of the vesting deed is taken by a vesting assent given by the personal representatives and containing the particulars mentioned above (ss. 6,

8). A deed creating a settlement existing at the beginning of 1926 is treated as a trust instrument, and the Act provided that, as soon as practicable, the trustees of the settlement might, and at the request of the tenant for life or statutory owner must, execute a vesting deed (s. 9). This normally declares that the legal estate in the settled land is vested in the tenant for life or statutory owner, for in nearly all cases the L.P.A., 1925, Sched. I, Pt. II automatically vested the legal estate in him at the beginning of 1926, but if in fact the legal estate was outstanding, the vesting deed operates to convey it. To ensure that the requirements of the Act as to vesting instruments shall not be evaded, s. 13 provides that where a tenant for life or statutory owner has become entitled to have a vesting instrument executed in his favour, no disposition of a legal estate can be made until a vesting instrument has been executed in accordance with the Act; until this has been done, any purported disposition of the land *inter vivos* by any person, operates only as a contract for valuable consideration to carry out the transaction, after the requisite vesting instrument has been executed (s. 13, S.L.A.). The section does not apply to a disposition made by a personal representative, to one made in favour of a purchaser of a legal estate without notice of the tenant for life or statutory owner having become entitled to a vesting instrument, to a disposition by a person coming within s. 20 (i) (ix) S.L.A. nor where the settlement has come to an end before a vesting instrument has been executed (*Re Alefounder's Will Trusts, Adnams v. Alefounder*, [1927] 1 Ch. 360). Where a settlement of land is already in existence, and the tenant for life purchases more land to be brought into the settlement, it will be conveyed by the vendor to the tenant for life or statutory owner by means of a subsidiary vesting deed containing, (i) the particulars of the last or only principal vesting deed affecting the land subject to the settlement (ii) the names of the trustees of the settlement, (iii) the name of any person entitled to appoint new trustees, (iv) a statement that the land conveyed is to be held upon and subject to the same trusts and powers as the land contained in the principal vesting deed (s. 10).

Other
transactions

1442. Any transaction affecting or concerning the settled land, not otherwise authorized by the Settled Land Act or the settlement, which, in the opinion of the Court, would be for the benefit of the (persons interested in the) settled land, may, under an order of the Court, be effected by the tenant for life, if it could validly have been effected by an absolute owner (of the land affected or concerned).

The words in brackets are not in the Act. Under the S.L.A., s. 64 (2) the Court could not sanction the application of capital money in payment for any improvement not authorized by the Act or under the settlement, but this limitation is repealed by the Settled Land and Trustees Acts (Courts General Powers) Act, 1943, s. 2.

1443. Any series of instruments dealing with the same land,^(a) and any group of instruments limiting different lands on the same (or substantially the same) limitations,^(b) will be deemed a settlement for the purposes of the Settled Land Act; and the tenant for life thereunder will be able to bind all interests arising by way of succession under such series of instruments, and all land comprised in such group of instruments.

"Compound settlement"

(a) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275 (since frequently followed).

Re Phillimore's Estate, Phillimore v. Milnes, [1904] 2 Ch. 460.

(b) *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427.

Re Freme, Freme v. Logan, [1894] 1 Ch. 1.

The definition of a "compound settlement" is far from easy; and no statutory definition is believed to exist, though the phrase appears in the S.L.A. s. 1 (1) *ad fin.* The importance of the question is great. Amongst other points, it may effect (i) the power of a tenant for life, as vendor, to give a title against persons having charges under an older deed (*Mundy and Roper's Contract, ubi supra*), (ii) the power to redeem a mortgage on Whiteacre out of money provided by the sale of Blackacre (*Re Monson, ubi supra*), (iii) the question whether a house is a "principal mansion house" (*Gilbey v. Rush*, [1906] 1 Ch. at p. 20, *per* KEKEWICH, J.), and (iv) the identity of the trustees (S.L.A. s. 31). On the other hand, there can be no doubt that several "settlements" may be contained in a single instrument, e.g. a testament.

1444. All equitable interests and powers in or over settled land are enforceable against the estate owner (*ante*, § 1440) in whom the settled land is vested, in manner provided by the Settled Land Act, 1925.

Equitable interests

S.L.A. s. 16.

1445. A "tenant for life", for the purposes of

"Tenant for life"

this Section, means any person of full age who is, for the time being, under a settlement as defined in § 1441, beneficially entitled to the possession of settled land for his life, or any two or more persons who are jointly so entitled ;^(a) whether he or they has or have alienated his or their interests or not,^(b) and whether the income is subject to charges or incumbrances,^(c) or a trust for accumulation,^(d) or not. Such person usually becomes the "estate owner" under the provisions of § 1440 *ante*.^(e)

(a) S.L.A. s. 19 (1), (2), (3).

(b) *Ibid.* s. 19 (4).

(c) *Ibid.* s. 19 (4).

(d) *Ibid.* (A tenant for life who has assigned his interest for value could not under the older S.L. Acts, without the assignee's consent, affect the latter's rights. But, under the provisions of the Act of 1925 (s. 104), if an assignment of his interest has been made after 1925, the consent of the assignee to the exercise of his statutory powers by the tenant for life is not required, but notice of the intended transaction must be given to the assignee.)

(e) *Ibid.* s. 4 (2).

It is clear that a "tenant for life" includes persons having only equitable interests. But neither the object of a merely discretionary trust (*Re Atkinson, Atkinson v. Bruce* (1886), 31 Ch. D. 577), nor a person taking in a fiduciary capacity (*Re Fennett and Guest's Contract*, [1907] 1 Ch. 629), nor a person the commencement of whose interest is actually postponed until the expiry of a trust for accumulation (*Re Strangways, Hickley v. Strangways* (1886), 34 Ch. D. 423), is a "tenant for life".

Infant's land

1446. When a minor is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute, or would, if of full age, be a tenant for life or have the powers of a tenant for life over settled land, the trustees of the settlement have, during his minority, in reference to the settled land and capital money, all the powers conferred by the Settled Land Act upon a tenant for life and the trustees of the settlement.

S.L.A. s. 26.

There are special provisions when the settlement arises under a testament (*ibid.*).

1447. Each of the following persons has, if of full age, when his estate or interest is in possession, the powers of a tenant for life as defined in this Section, viz. :—

Persons having powers of a tenant for life

- (i) a tenant in tail (including a tenant in tail after possibility of issue extinct (*ante*, § 1230) and a tenant in tail who is restrained from barring or defeating the estate tail by Act of Parliament, and although the reversion is in the Crown, but not where the land was purchased with money provided by Parliament in consideration of public services) ;
- (ii) a tenant in fee simple, or for a term of years absolute, subject to an executory limitation over (*ante*, § 1269 (n)) ;

Where land was devised to A with a condition of residence in a house and maintenance there of a home for B, with a gift over on non-compliance with the condition, held, A was a tenant for life within this paragraph and could exercise the statutory powers (*Re Richardson, Richardson v. Richardson*, [1904] 2 Ch. 777).

- (iii) a person entitled to a base or determinable fee (*ante*, § 1232), although the reversion or right of reverter is in the Crown, or to any corresponding interest in leasehold land ;
- (iv) a tenant for years determinable on life, not holding merely under a lease at a rent ;
- (v) a tenant *pur autre vie* (*ante*, §§ 1245–1247) not holding merely under a lease at a rent ;

The effect of these two paragraphs is to exclude a person, entitled under a lease at a rent, whether nominal or not, from coming within the section (*Re Catling, Public Trustee v. Catling*, [1931] 2 Ch. 359).

- (vi) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during the life of the *cestui que vie*, or is subject to a trust

for accumulation of income for any purpose ;

In this subsection there is no restriction such as that applying to (iv).

(vii) a tenant by the curtesy ;

For the "tenant by the curtesy" see *post*, § 2062. Such persons are, by reason of changes in the Laws of Succession introduced by the Administration of Estates Act, 1925, now somewhat rare.

(viii) a person beneficially entitled to land for an estate in fee simple or for a term of years absolute, subject to any estates, interests, charges or power of charging, subsisting or capable of being exercised under a settlement ;

(ix) a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, unless the land is subject to an immediate binding trust for sale ;

(x) a married woman restrained from anticipation, entitled to land for an estate in fee simple or for a term of years absolute.

S.L.A. s. 20.

This last class is likely to diminish rapidly in numbers, owing to the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935 (*ante*, § 44).

*Statutory
powers in-
alienable*

1448. A tenant for life under this Section cannot assign or release his statutory powers, or contract not to exercise them ; nor do they pass with an assignment, by operation of law or otherwise, of the tenant for life's interest in the land.

S.L.A. s. 104.

This paragraph supersedes the provisions of the S.L.A., 1890 s. 50. But rights acquired under the last-mentioned Act are preserved (*ibid.* (3), (5)). Where a tenant for life surrenders his interest to the person next entitled in remainder or reversion under the settle-

ment, with the intention of extinguishing his interest, the statutory powers cease to be exercisable by him and become exercisable as if he were dead (S.L.A., s. 105). Thus if land is settled on A for life, then on B for life, then on C in fee simple, and A surrenders his life interest to B, A's powers cease, and he must convey the land to B by a vesting deed (s. 7 (4)) and B now has the statutory powers. The same would apply if A was bankrupt and his trustee in bankruptcy surrendered his life interest to B (*Re Shawdon Estates Settlement*, [1930] 2 Ch. 1). If B then surrendered his life interest to C, he must convey the legal estate to C by an ordinary conveyance, for the land has ceased to be settled land (s. 3). The Court may allow the trustees to exercise the statutory powers in the name and on behalf of the tenant for life, when he has ceased to have a substantial interest in the settled land, whether by bankruptcy assignment or otherwise, and he either consents to an order being made, or else has unreasonably refused to exercise his statutory powers (s. 24).

1449. The settlor cannot, directly or indirectly, *Cannot be excluded* limit or prohibit the exercise of the statutory powers of the tenant for life by any provision in the settlement; but additional or larger powers may be conferred by the settlement, so far as they are not inconsistent with the statutory powers.

S.L.A. s. 106.

It is expressly provided in the Act (s. 106 (3)) that no exercise of the tenant for life's powers shall occasion a forfeiture (presumably under the settlement); and the Act provides (s. 106 (2)) that any limitation of any interest until the exercise of such powers shall be treated as absolute. A condition that the tenant for life shall lose his interest on ceasing to reside on the land does not operate, if he ceases to reside on the land merely by reason of having exercised his power of selling, leasing or exchanging; but the condition is valid and obliges the tenant for life to reside on the land until he has disposed of it by the exercise of his statutory powers (*Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276); (*Re Orlebar, Orlebar v. Orlebar*, [1936] Ch. 147); (*Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378).

1450. In exercising his statutory powers, the *Fiduciary* tenant for life must have regard to the interests of all parties entitled under the settlement; and he is, in relation to such exercise, deemed to be in the position,

and to have the duties and liabilities, of a trustee for those parties.

S.L.A. s. 107.

It is by reason of this provision that a tenant for life is unable to delegate the exercise of his statutory powers (*Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. at p. 55, *per* WARRINGTON, J.); except under the provisions of the Trustee Act, 1925, s. 25. Also, that any benefit obtained by him by reason of his position will form part of the settled property (*Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424). *Quære*: whether the whole of the law laid down by Courts of Equity regarding the duties and liabilities of an express trustee applies to a tenant for life. Under S.L.A., s. 16 (1) the tenant for life is made a trustee of the land. See further, *Potter*, 1938 *Conveyancer*, pp. 233-240. A tenant for life being a trustee both of the land and of his powers cannot acquire any part of the settled land for himself, for it is a rule of equity that a trustee cannot acquire trust property for himself. To overcome this difficulty, the S.L.A., s. 68, provides that any disposition of the settled land may be made to the tenant for life, capital money may be advanced to him on mortgage, and land may be bought from or exchanged with him, but in such transactions the statutory powers pass from the tenant for life to the trustees of the settlement, and they will have all the powers of a tenant for life in connection with the transaction, as well as their own powers as trustees.

Lunatic tenant for life

1451. Where a tenant for life, or a person having the powers of a tenant for life, is a lunatic or defective, whether so found by inquisition or not, his committee or receiver may, under an order of the Court, exercise the powers of a tenant for life in his name and on his behalf.

S.L.A. s. 28, 117 (1) (xiii), (xxviii).

For "defectives" see Mental Deficiency Act, 1913, s. 1, and 1927, s. 1. For "lunatic" generally substitute "person of unsound mind" (Mental Treatment Act, 1930, s. 20 (5)).

Consent to exercise

1452. The statutory powers of a tenant for life may not be exercised without the consent of the trustees of the settlement or an order of the Court in the following cases, *viz.* :—

(a) in the cutting of timber where the tenant for life is impeachable for waste ;

S.L.A. s. 66 (1).

- (b) in selling, exchanging, or leasing the principal mansion house and the pleasure grounds and park and lands (if any) usually occupied therewith, if the settlement provides to the contrary ;

S.L.A. s. 65 (1).

What is a "principal mansion house" may be a question of difficulty (*Gilbey v. Rush*, [1906] 1 Ch. 11) ; but the Act provides (s. 65 (2)) that a house which is usually occupied as a farm house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of the section.

- (c) in making improvements out of capital money arising under the Settled Land Act (*post*, §§ 1462-1463).

S.L.A. s. 84 (2).

The power to mortgage for payment of costs can only be exercised by direction of the Court (S.L.A., s. 71 (1) (ix). For improvements generally see ss. 83-87.

1453. A tenant for life can, under his statutory "*Heirlooms*" powers, sell personal chattels settled on trust so as to devolve with the settled land, or as nearly as may be in accordance with the law or practice in force at the date of the settlement, or settled together with land, or upon trusts declared by reference to the trusts affecting land. But such sale cannot be made without an order of the Court.

S.L.A. s. 67.

The proceeds of sale are treated as capital money ; but they may be employed in purchasing other chattels to be settled on the same trusts (*ibid.* (2)).

1454. Where the tenant for life wishes to acquire by purchase, exchange, mortgage, lease, or otherwise, any part of the settled land, or where it is proposed to purchase from the tenant for life any land to be included in the trusts of the settlement, the statutory

*Dealings
with tenant
for life*

powers of the tenant for life are exercised by the trustees of the settlement.

S.L.A. s. 68.

*Power to
contract*

1455. A tenant for life may enter into a binding contract to do any of the acts which he has statutory power to do, and vary or rescind the contract. Such contract will (unless varied or rescinded) enure for the benefit of the settled land, and be enforceable against and by every successor in title for the time being of the tenant for life ; and every such successor may rescind or vary the same as the tenant for life might have done, or may, for the purpose of carrying into effect such contract, grant any lease or make any conveyance which, if made by such predecessor, would have been binding on his successors in title.

S.L.A. s. 90.

*Validation
of voidable
leases*

1456. Where, in the intended exercise of any statutory or other lawful power, a lease has been *bonâ fide* granted, but not in conformity with such power, and the lessee has entered thereunder, such lease will be deemed in equity a contract to grant, at the request of the lessee, his representatives or assigns, a valid lease under such power ; and all persons who would have been bound by a valid lease under such power, are bound by such contract, unless they are willing to confirm without variation the lease actually granted. If the estate of the person granting such lease continues until after the time when he could have lawfully granted it, such lease will take effect as if it had been granted at such time.

L.P.A., 1925, s. 152.

A simple memorandum, on or before acceptance of rent, by a person entitled to treat the lease as invalid, confirming the lease, will have the effect of a confirmation by such person ; and where a reversioner becomes able to confirm an invalid lease, the lessee cannot refuse to accept confirmation (*ibid.* s. 152 (3)). The section is not

confined to tenants for life ; but it does not apply to leases of land held on charitable, ecclesiastical, or public trusts (*ibid.* (7)).

1457. A tenant for life, intending to exercise any of his statutory powers, must, unless such notice is waived, generally or specially, by the trustees, give one month's notice by registered letter to each of the trustees of the settlement and their solicitor (if known to the tenant for life).

Notice of intention to exercise powers

S.L.A. s. 101 (1).

But—

- (i) such notice, as regards a sale, exchange, or lease, may be of a general intention ;

S.L.A. s. 101 (2).

The tenant for life must, if required by the trustees, from time to time furnish them with particulars and information as to the progress of such sales, exchanges, or leases (*ibid.* (3)).

- (ii) it is not required in the case of intention to grant a lease for a term not exceeding twenty-one years at the best rent that can reasonably be obtained without fine, and where the lessee is not exempted from punishment for waste ;

S.L.A. s. 42 (5).

- (iii) any trustee may, by writing under his hand, waive notice, or may accept less than one month's notice ;

S.L.A. s. 101 (4).

- (iv) a person dealing in good faith with the tenant for life is not concerned to see that such notice has been given.

S.L.A. s. 101 (5).

1458. For the purposes of the Settled Land Act, the following persons, in the order named, are deemed alternatively to be trustees of the settlement, viz. :—

Trustees for purposes of the Acts

- (i) the persons, if any, who, under the settlement,

are trustees with power of sale (subject or not to the consent of any person), or to consent to a sale, or to approve of the exercise of a power of sale of the settled land ;

S.L.A. 30 (1) (i).

- (ii) the persons, if any, declared by the settlement to be trustees for the purposes of the Acts ;

S.L.A. 30 (1) (ii).

- (iii) the persons, if any, for the time being under the settlement trustees with power of or upon trust for sale of any other land, comprised in the settlement and subject to the same limitations as the land to be sold, or otherwise dealt with, or with power of consent to or approval of the exercise of such a power of sale ;

S.L.A. 30 (1) (iii).

- (iv) the persons, if any, for the time being under the settlement trustees with future power of sale, or under a future trust for sale, of the settled land, or with power of consent to or approval of the exercise of such a future power of sale, (and) whether the power or trust takes effect in all events, or not ;

S.L.A. 30 (1) (iv).

- (v) the persons, if any, appointed by deed to be trustees of the settlement by all the persons who at the date of the deed were together able, by virtue of their beneficial interests or by the exercise of an equitable power, to dispose of the settled land in equity for the whole estate the subject of the settlement ;

S.L.A. 30 (1) (v).

- (vi) the persons appointed by the Court for the purpose.

S.L.A. s. 34.

The Court may appoint when there are no trustees, or "where in any other case it is expedient" (*ibid.* (1)). The powers conferred by (i), (iii), and (iv) *supra* supersede the relevant statutory powers of the tenant for life or statutory owner (s. 30 (2)). The provisions of the Trustee Act, 1925, regarding the appointment of new trustees (see especially ss. 35-40 of that Act) apply to trustees for the purposes of the S.L.A. (Trustee Act, 1925, s. 64 (1)). Capital money must not be paid to less than two trustees or a trust corporation, i.e. the Public Trustee or a corporation either appointed by the Court in a particular case to be a trustee, or entitled by Rules made under s. 4 (3) of the Public Trustee Act, 1906, to act as custodian trustee (S.L.A., ss. 18 (1) (c), 94 (1), 117 (1) (xxx)).

The principal function of Settled Land Act trustees is to exercise a general supervision over the well-being of the settled land and to guard the interests of the beneficiaries.

They may be summarised,

- (i) to receive and invest capital money arising under the powers and provisions of the Act (ss. 18, 84) ;
- (ii) to receive notice from the tenant for life of his intention to exercise his statutory powers (ss. 101, 42 (5)) ;
- (iii) to give or refuse consents necessary for some of his powers (ss. 65, 66) ;
- (iv) to exercise the powers of the tenant for life where he wishes to acquire the settled land for his own benefit (s. 68), and after an order of the Court under s. 24 ;
- (v) to act as statutory owners where there is no tenant for life, or where the tenant for life is an infant (s. 23) ;
- (vi) to act as special personal representatives where the tenant for life dies and the land remains settled land (s. 7).

1459. Capital moneys arising under the Settled Land Act must be paid to the trustees of the settlement or into Court, at the option of the tenant for life, and be invested or applied by and in the names or under the control of the trustees, or under the direction of the Court in compliance with the provisions of the Act, according to the direction of the tenant for life, or, in default, according to the discretion of the trustees. *Capital moneys*

S.L.A. s. 75.

Such moneys and investments are regarded as land subject to the dispositions of the settlement (*ibid.* (5)).

*Damages
for breach
of covenant*

1460. Money, not being rent, received (*semble* by the tenant for life) by way of damages or compensation for breach of any covenant by a lessee or grantee contained in any lease or grant of settled land will (unless the Court otherwise directs) be deemed capital money arising under the Settled Land Act, and be treated accordingly.

S.L.A. s. 80 (1).

Before 1926 the tenant for life, in whose name the proceeding against the breaker of the covenant were conducted, was entitled to retain the proceeds (*Re Lacon's Settlement, Lacon v. Lacon*, [1911, 2 Ch. 17]); and the new section is not retrospective (s. 80 (5)). Moreover it may be excluded by the settlement (*ibid.* (6)).

*Investment
of capital
moneys*

1461. Capital moneys arising under the Settled Land Act are applicable (*inter alia*)—

- (i) in making investments specified in the Trustee Act, 1925, ss. 1-7 ;

S.L.A. s. 73 (1).

The provisions of the Trustee Act are a good deal wider than those of the S.L.A. in this respect. But, presumably, they supersede the latter.

- (ii) in discharge of incumbrances, statutory or voluntary, on the inheritance or other the whole estate subject to the settlement ;

S.L.A. s. 73 (ii).

E.g. such statutory charges as land tax, Crown rents, chief rents or quit rents, and, presumably, annuities in lieu of tithe rent charge imposed on the settled land under the provisions of the Tithe Act 1936 (see s. 13 of that Act).

- (iii) in payment for improvements authorized by the Settled Land Act (*post*, §§ 1462-1463) ;

S.L.A. s. 73 (iii), (iv).

- (iv) in payment for equality of exchange of the settled land ;

S.L.A. s. 73 (v).

- (v) in payment of fines payable in respect of the

alienation of any part of the settled land affected by manorial incidents, or as compensation for the extinguishment of manorial rights or of acquisition of such rights ;

S.L.A. s. 73 (vi), (vii).

- (vi) in purchase of the freehold reversion in fee of any part of the settled land which is held on lease for years ;

S.L.A. s. 73 (x).

- (vii) in purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the date of the purchase ;

S.L.A. s. 73 (xi).

but—

capital money arising from settled land in England or Wales may not (unless the settlement so expressly authorizes) be applied in the purchase of land out of England and Wales ; and

S.L.A. s. 73 (2).

- (viii) in purchase in fee simple, or for a period of sixty years or more, of mines or minerals convenient to be held or worked, or of any easement, right, or privilege convenient to be held, with the settled land ;

S.L.A. s. 73 (1) (xii).

- (ix) in payment to any person becoming absolutely entitled, or empowered to give an absolute discharge ;

S.L.A. s. 73 (1) (xix).

Presumably, to or for the capital money in question.

- (x) in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Settled Land Act.

S.L.A. s. 73 (1) (xx).

- (xi) in any other mode authorized by the settlement with respect to money produced by the sale of the settled land.

S.L.A. s. 73 (1) (xxi).

There are other applications authorized by s. 73 of the S.L.A., for which readers are referred to the section itself.

Improvements by trustees

1462. The trustees of a settlement to which the Settled Land Act, 1925, applies may expend capital money in their hands in making any improvements authorized by the Act or the settlement, (1) on a certificate of a competent engineer or able practical surveyor, employed independently of the tenant for life, certifying that the work or operation comprised in the improvement, or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, *or* (2) on an order of the Court directing or authorizing the trustees so to apply a specific portion of the capital money accordingly.

S.L.A. s. 84 (2).

The tenant for life and any of his successors with limited interests must, if so required by the Minister of Agriculture, repair and insure the improvements made out of capital moneys, and report to the Minister of Agriculture on the state thereof; and they may not cut down timber planted as an improvement (*ibid.* s. 88 (1)-(3)). On the other hand, the tenant for life and his successors, though limited owners, may with impunity commit many kinds of waste in executing or repairing improvements authorized by the Act (*ibid.* s. 89). The Court has now power to authorize the expenditure of capital moneys on improvements made by the tenant for life; even though the latter has not previously submitted a scheme (*ibid.* s. 84 (1)). The Court may now sanction capital money being applied in payment of costs of repairs, which while they are not improvements within the meaning of the S.L.A. Sched. III, are in fact "permanent improvements" to the settled land (Settled Land and Trustee Acts (Courts General Powers) Act, 1943 (*Re Scarisbrick Re-settlement Estates*, [1944] Ch. 229).

Improvements by Court

1463. When the capital money to be expended is in Court, the Court may, either on a report or certifi-

cate of the Minister of Agriculture, or of a competent engineer or able practical surveyor approved by the Court, or on such other evidence as the Court may think sufficient, give orders and directions for the application of the money in or towards payment for the improvement.

S.L.A. s. 84 (3).

In either case, the trustees, or the Court may, in the case of certain kinds of improvements, and, in the case of others, must, stipulate that the money advanced shall be repaid by instalments out of the income of the settled land to the capital fund (subs. (2), (4), (5)). The tenant for life may create a rent charge out of the settled land to meet these instalments (*ibid.* s. 85).

1464. A tenant in tail (in possession) may by ordinary deed grant a lease of any part of the entailed land for a period not exceeding twenty-one years, to commence at any time not exceeding twelve months from the date of the lease, at a rent not less than five-sixths of a rackrent ; and such lease will be binding both on the issue in tail and on the reversioner or remainderman (including the Crown).

*Leases by
tenant in
tail*

Fines and Recoveries Act, 1833, ss. 15, 41.

The tenant in tail in possession has now much wider powers under the Settled Land Act (*ante*) ; but these provisions of the Fines and Recoveries Act seem not to have been repealed. Dowresses and husbands seised of their wives' land *jure mariti* could formerly make leases under the provisions of the Settled Estates Act, 1877, s. 46 (now repealed). Owing to recent changes in the law such persons are now rare.

Note

Under the powers conferred by numerous statutes, e.g. the Public Money Drainage Acts, 1846-1856, and the Improvement of Land Acts, 1864 and 1899, public and private moneys can be advanced for the purpose of making various classes of improvements of land, and can be charged upon the inheritance by way of terminable rent charge. Proceedings under these Acts are usually initiated by limited owners ; but the details are too lengthy to be set out here. It may be mentioned, however, that, by s. 115 of the S.L.A., all the improvements which, by that Act, are authorized to be made out of

capital moneys in the hands of the trustees or the Court, may, under the authority of the Minister of Agriculture, be made by the alternative machinery of the Improvement of Land Act, 1864.

*Duration of
settlements*

1465. Land not held upon trust for sale once settled, remains settled so long as any limitation, charge or power of charging under the settlement still exists or is capable of being exercised, or the person beneficially entitled in possession is an infant.

S.L.A. 1925, s. 3. L.P.(Am.)A. 1926 Sched.

In order to record the fact that the land is no longer settled, and is free from the restrictions of the Settled Land Act, especially the requirement that capital money arising on the exercise of the statutory powers must be paid to the trustees of the settlement, a deed of discharge is executed by the trustees declaring that they are discharged so far as regards that land ; in cases of difficulty the Court may make an order discharging the trustees. Unless the deed of discharge otherwise provides, a purchaser is entitled to assume that the land is no longer settled land and is not subject to a trust for sale (s. 17). A deed of discharge is not required (1) if the settlement comes to an end before a vesting instrument has been executed (*Re Alefounder's Will Trusts, Adnams v. Alefounder*, [1927] 1 Ch. 360) ; (2) if the settlement comes to an end on the death of the tenant for life. When land is settled on A for life remainder to B in fee simple, the settlement ends on A's death. A's general personal representatives will give a written assent to the legal estate vesting in B. This simple assent will contain no mention of Settled Land Act trustees, and a *bonâ fide* purchaser for value of the legal estate from B is entitled and bound to assume that B holds it free from all the rights arising under the settlement (s. 110).

PART II

CHATTELS CORPOREAL

SECTION VIII

POSSESSION OF CHATTELS CORPOREAL

TITLE I—ACQUISITION AND LOSS OF POSSESSION

1466. A chattel corporeal is a movable material *Chattels corporeal* object, whose value is derived chiefly from its physical qualities.

The expression "chattels corporeal" is wider than "goods", which does not include current money; but it is narrower than "movables", which includes things in action. The most difficult group of legal "things" to classify is that comprising negotiable instruments, bills of lading, and the like documents of title. *Quid* locuments, they are chattels corporeal; and they were the subject of petty larceny at the common law. On the other hand, their chief value certainly arises from their legal, not their physical qualities. That was the trouble, until Statutes solved it. Less difficult is the case of invisible or intangible things like coal gas and electric current. The former was stealable, even at the common law; and the latter has been made the subject of larceny by statute (Larceny Act, 1916, s. 10).

1467. Possession of chattels corporeal is ac- *Acquisition*quired by (i) taking, (ii) delivery.

For the nature of possession of chattels, according to English Law, see the well-known work *Possession in the Common Law* (Clarendon Press, 1888), by the late Sir Frederick Pollock and the late Sir R. S. Wright. Briefly, any power to control generally the user and location of a chattel, other than the mere physical power exercised by a servant to whom a chattel has been entrusted by his master, or the mere custody for a special purpose of a temporary and revocable bailee, is possession for the purposes of English Civil Law

(*Charlesworth v. Mills*, [1892] A.C. 231, at p. 237, *per* Lord HALSBURY, C.). The legal position of the loser of chattels is obscure ; but (*semble*) he can bring Trespass and, therefore, he retains possession, until he has given up hope of recovering them (*Isaack v. Clark* (1615), 2 Bulst. at p. 312).

Taking

1468. The person who assumes effective ^(a) physical control over a chattel corporeal acquires the possession of such chattel ; ^(b) whether or not the chattel was at the time in the possession of another person. ^(c)

(a) *Young v. Hichens* (1843), 6 Q.B. 606.

(b) *Armory v. Delamirie* (1722), 1 Stra. 505.

Bridges v. Hawkesworth (1851), 21 L.J. (Q.B.) 75.

Charlesworth v. Mills, [1892] A.C. 231.

(c) *R. v. Riley* (1853), 1 Dears. C.C. 149.

Even a thief may acquire possession (*Mason v. Lickbarrow* (1790), 1 Hy. Bl. at p. 360, *per* Lord LOUGHBOROUGH, C.J.).

Chattels on and in land

1469. A man who has possession of land is deemed to have possession of all chattels corporeal attached to or under the land, whether he is aware of their existence or not ; ^(a) but (*semble*) not necessarily of those chattels unattached to the land, unless he has a sufficient *animus possidendi* and control. ^(b) When two persons, including husband and wife, are in joint possession of land, chattels on the land will be deemed to be in the possession of that one of them who is owner of the chattels ("ownership draws possession"). ^(c)

(a) *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562.

South Staffordshire Water Co. v. Sharman, [1896] 2 Q.B. 44.

(b) *Bridges v. Hawkesworth* (1851), 21 L.J. (Q.B.) 75 ; 15 Jur. 1079.

Hannah v. Peel, [1945] K.B. 509.

The first of these cases shows that one person may have possession of the surface and another of the sub-soil, for this purpose. A difficult question of possessory lien may arise in such cases. (See *G.E.Rly. Co., v. Lord's Trustee*, [1909] A.C. 109.) Presumably the doctrine of the text extends also to give to the possessor of a movable the possession of its contents (*Cartwright v. Green* (1803), 8 Ves. Jun. 406 ; *Merry v. Green* (1841), 7 M. & W. 623).

- (c) *Ramsay v. Margrett*, [1894] 2 Q.B. 18.
French v. Gething, [1921] 3 K.B. 280 (affirmed on appeal, [1922] 1 K.B. 236).
Youngs v. Youngs, [1940] 1 K.B. 760.

1470. Delivery of a chattel corporeal is effected *Delivery*
 by a release of his control by the former possessor,
 with the intent that another person shall acquire
 control,^(a) followed by an effective taking of control
 of such chattel by such other person.^(b)

- (a) *Rooth v. Wilson* (1817), 1 B. & Ald. 59.
Moore v. Robinson (1831), 2 B. & Ad. 817.
Dixon v. Yates (1833), 5 B. & Ad. 313.
The Winkfield, [1902] P. 42.
 (b) *Reddel v. Dobree* (1839), 10 Sim. 244.
Wood v. Tassell (1844), 6 Q.B. 234.
Hilton v. Tucker (1888), 39 Ch. D. 669. (This case, if correctly
 decided, shows that the "taking" of control on delivery will be
 presumed where it is clearly feasible.)

Where several chattels are intended to be disposed of by one transaction, taking control of part by the intended deliverer is, if so intended by both parties, equivalent, for some purposes, to taking possession of the whole (*Slubey v. Heyward* (1795), 2 Hy. Bl. 504; *Hammond v. Anderson* (1803), 1 Bos. & P.(N.R.) 69; *Kemp v. Falk* (1882), 7 App. Cas. 573, at p. 586, *per* Lord BLACKBURN). In the Sale of Goods Act, 1893, delivery means, unless the context or subject-matter otherwise requires, the "voluntary transfer of possession from one person to another" (s. 62 (1)). This definition seems to be quite consistent with that in the text, but does not explain much about the nature of delivery generally. The old name for delivery was "bailment". But, when, after the publication of Sir William Jones' famous *Essay on Bailments* in 1781, the Courts began to be concerned with the contracts deemed to arise out of various classes of bailments (hire, loan of goods, deposit, etc.), the word came to be applied rather to those contracts than to the bailment which gave rise to them. (For these contracts, see *ante*, Book II, Part II, Sections III, IV, V, VII, VIII.)

1471. Where specific and ascertained goods are *Delivery order*
 in the custody of a wharfinger or warehouseman,
 as agent for the owner, an order by the latter to the
 wharfinger or warehouseman, directing him to hold
 the chattels at the disposal of another person, will,
 when assented to by the wharfinger or warehouseman,

be equivalent to a delivery to such other person by the person giving the order.

Lucas v. Dorrien (1817), 7 Taunt. 278.

Godts v. Rose (1855), 17 C.B. 229, at p. 235, *per* WILLIAMS, J.

Pearson v. Dawson (1858), E.B. & E. 448, at p. 456, *per* Lord CAMPBELL, C.J.

The rule holds, even when the deliveror and the warehouseman are the same person (*Castle v. Sworder* (1861), 6 H. & N. 828). But a mere delivery order has not the effect of changing the possession, until it is assented to by the wharfinger or warehouseman (*M'Ewan v. Smith* (1849), 2 H.L.Cas. 309). And, where unascertained goods have been the subject of a sale or other transaction, a delivery order does not pass possession until the goods have been weighed or otherwise ascertained (*Hawes v. Watson* (1824), 2 B. & C. 540; *Mordaunt Brothers v. British Oil and Cake Mills*, [1910] 2 K.B. 502). An indorsement and delivery of a dock warrant issued by a dock company has by custom much the same effect as the giving of a delivery order (*Zwinger v. Samuda* (1817), 7 Taunt. 265).

*Delivery
long à
manu*

1472. Delivery may be effected by handing to and acceptance by the deliverer of a key or other means by which the deliverer may obtain access to the chattels intended to be delivered; but the handing over and acceptance of a mere symbol of ownership or possession will not be a delivery of the chattels symbolized.

Jones v. Selby (1710), Prec. (Ch.) 300.

Ward v. Turner (1752), 2 Ves. Sen. 431, at p. 443, *per* Lord HARDWICKE C.

Chaplin v. Rogers (1800), 1 East, 192.

Hilton v. Tucker (1888), 39 Ch. D. 669.

There is no such thing as "symbolical possession".

*Loss of
possession*

1473. Possession of a chattel corporeal may be lost (i) by abandonment, (ii) by transfer or delivery, (iii) by taking, or (iv) by destruction.

It should be noted that loss of physical control (*de facto* possession) does not necessarily mean loss of legal possession, e.g. a trustee of chattels left under the control of a beneficiary (*Barker v. Furlong*, [1891] 2 Ch. 172).

In the case of *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A.C. 166, certain expressions of some of the learned lords might lead to the conclusion that the mere appointment of a receiver

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by the Court would of itself divest the possession of the then possessor of the goods. But it appears that, in fact, the goods had been actually delivered to the receiver (*Ibid.* at p. 169).

1474. Where the control of a chattel corporeal *Finding* has been intentionally abandoned by its former possessor, the latter ceases to have possession of it ; and the finder of the chattel who takes it acquires possession of it.

R. v. Glyde (1868), L.R. 1 C.C.R. 139, at p. 141, *per* COCKBURN, C.J.

Semle : the finder acts at his own risk, so far as civil trespass is concerned (*Merry v. Green* (1841), 7 M. & W. 623). But if he has no reason to believe that the chattel has been accidentally lost, nor any reason for thinking that the loser can be found, he is not guilty of larceny if he appropriates it (*R. v. Glyde, ubi supra* ; *R. v. Knight* (1871), 12 Cox, C.C. 102).

1475. Taking, lawful or unlawful, by another *Taking* person of a chattel deprives the former possessor of possession.

Y.B. 21 Edw. IV, [1482] Hil. pl. 9 at fo. 74, *per* BRIAN, C.J.

Y.B. 4 Hen. VII, [1489] Pasch. pl. 1 at fo. 5, *per* HUSSEY, C.J.

One of the most common cases of lawful taking is by a sheriff or County Court bailiff under a writ of execution (*Charlesworth v. Mills*, [1892] A.C. 231). Goods seized by a private distrainor are, however, deemed to be in the possession of the distrainee until actually removed from the premises (*Whitley v. Roberts* (1825), M'Cle. & Yo. at p. 118, *per* HULLOCK, B.) ; and it would seem that a sheriff has not possession of goods of the existence of which, though they were on the premises, he was unaware (*Johnson v. Pickering*, [1908] 1 K.B. 1).

1476. The possession of chattels corporeal which *Chattels of deceased* were in the possession of a deceased person at the time of his decease is deemed to have vested in his executor ^(a) or administrator ^(b) at the moment of his decease.

(a) *Fisher v. Young* (1614), 2 Bulst. 268.

(b) Y.B. 36 Hen. VI (1457), Mich. pl. 4 at fo. 7.

Long v. Hebb (1652), Sty. 341, *per* ROLLE, C.J.

Tharpe v. Stallwood (1843), 5 Man. & G 760.

TITLE II—RIGHTS AND LIABILITIES OF POSSESSORS

Rights

1477. The possessor of a chattel corporeal has the following rights, viz. :—

- (i) to defend his possession by force if necessary (except as against a person entitled to deprive him of it), and to retake possession against anyone who has wrongfully deprived him of it;

§ 781 *ante*.

- (ii) to bring actions in the nature of Trespass, Trover, Detinue, and Replevin, against anyone wrongly interfering with, or depriving him of, his possession.

As to the nature of these actions, see Book II, Part IV *ante*.

Liabilities

1478. The possessor of animals or other chattels corporeal is liable for damage caused by such animals or other chattels to the extent specified in §§ 760–767 and §§ 1021–1023 *ante*.

Generally speaking, the mere possessor of chattels is not, as such, liable for damage to other persons caused by them. But of course he may be made liable for intentional or negligent use of them. The nature of the wrong thus committed will depend, according to the classification adopted by the English Law of Torts, upon the nature of the damage caused.

SECTION IX

OWNERSHIP OF CHATTELS CORPOREAL

TITLE I—GENERAL

1479. The user and disposition of chattels corporeal cannot, except in the case of patented articles,^(a) be subjected to any conditions or restrictions, in such a manner as to bind owners generally ;^(b) and, in the case of patented articles, such conditions and restrictions are only binding on persons who take with notice of them,^(c) and subject to the provisions of the Patents and Designs Acts, 1907–1932.

*Restrictions
on ownership*

- (a) *Incandescent Gas Light Co., Ltd. v. Canelo* (1895), 12 R.P.C. 262, at p. 264, *per* WILLS, J., approved in *National Phonograph Co. of Australia, Ltd. v. Menck*, [1911] A.C. 336, P.C.
- (b) *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354. *McGruther v. Pitcher*, [1904] 2 Ch. 306.
- (c) *National Phonograph Co. of Australia, Ltd. v. Menck*, *ubi supra*, at p. 351. *Columbia Graphophone Co. Ltd. v. Murray* (1922), 39 R.P.C. 239. *Gillette Industries, Ltd. v. Bernstein*, [1942] Ch. 45.

The rule in the text only applies to attempts to bind purchasers *in rem*, not to contractual restrictions. The decision in *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108, (P.C.) is inconsistent with *Taddy & Co. v. Sterious & Co.* (*ubi supra*) and has been restricted in its application “to the very special case of a ship under a charter-party” (*Glore v. Theatrical Properties, Ltd. and Westby & Co. Ltd.*, [1936] 3 All E.R. 483, at p. 490, *per* Lord WRIGHT) and was viewed with some doubt by Lord GREENE, M.R., in *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234 at p. 239.

1480. At common law, no successive estates could be created in chattels corporeal ;

*Successive
interests in
chattels*

Re Walker, Macintosh-Walker v. Walker, [1908] 2 Ch. 705.

But—

(i) chattels corporeal (not being consumable

goods) may, subject to the Rules against Perpetuities and Accumulations (*post*, §§ 1679-1690), be vested by deed or testament in trustees upon trust to permit one or more persons to enjoy, simultaneously or successively, the use of them for life or years, with a subsequent trust for the benefit of other persons ;

Hoare v. Parker (1788), 2 Term Rep. 376 (testament).

Scarsdale (Lord) v. Curzon (1860), 1 John. & H. 40 (deed).

Re Hill, Hill v. Hill, [1902] 1 Ch. 807 (testament).

Re Lord Chesham's Settlement, Valentia (Viscount) v. Chesham (Lady), [1909] 2 Ch. 329 (deed).

Re Thynne, Thynne v. Grey, [1911] 1 Ch. 282 (testament).

The cases stop at a life interest ; but since the taking effect of the Law of Property Act, 1925, there is now no objection to creating an equitable entailed interest by way of trust in a settlement of chattels by the proper use of technical words (s. 130 (1); *Re Price*, [1928] 1 Ch. 579) ; though such interests cannot be created by the will of a testator who died before 1926 (*Re Hope's Will Trust, Hope v. Thorp*, [1929] 2 Ch. 136). As to consumable goods, a specific bequest for life of these is an absolute gift, so that a gift over is void (*Andrew v. Andrew* (1845), 1 Coll. 686 ; *Breton v. Mockett* (1878), 9 Ch. D. 95).

- (ii) such chattels may, subject to the same Rules, be bequeathed directly to one person, with an executory limitation over (*ante*, § 1265) in favour of another ;

Jolly v. Wills (1678), 2 Rep. Ch. 137.

Hyde v. Parrat (1696), 1 P. Wms. 1.

Foley v. Burnell (1785), 1 Bro. C.C. 274.

Re Tritton, Ex parte Singleton (1889), 61 L.T. 301.

The precise nature of the interests so created is uncertain ; but it appears that the person having the first interest is entitled absolutely subject to an executory contingent interest for the ultimate donee, and a duty to preserve the property. (*Re Tritton (ubi supra)* ; *Re Thynne (ubi supra)* ; *Re Swan, Witham v. Swan*, [1915] 1 Ch. 829).

- (iii) the possession of chattels corporeal may, by way of hire, loan, deposit, or other bailment or delivery (*ante*, § 1470), be vested in one person, the ownership remaining in another.

OWNERSHIP OF CHATTELS CORPOREAL 799

This is, of course, not, strictly, a case of successive, but of concurrent interests.

1481. An owner of chattels corporeal has in respect of injury to his ownership the remedy described in §§ 882, 884, *ante*. *Remedy of owner*

Of course, if the owner is in possession, he will also have, and will naturally prefer, his possessory remedies.

1482. Where a chattel of a rare and peculiar value, for the loss of which damages would not be an adequate remedy,^(a) is unlawfully withheld from the person entitled to it, or where any chattel has been withheld from the person entitled to it, by an abuse of fiduciary relationship,^(b) the Court, in the exercise of its equitable jurisdiction, may order the person in whose hands such chattel is, to yield or restore it to the person entitled, on pain of imprisonment. *Specific delivery*

(a) *Pusey v. Pusey* (1684), 1 Vern. 273.

Somerset (Duke) v. Cookson (1735), 3 P. Wms. 390, and compare *North v. G.N. Ry.* (1860), 2 Giff. at p. 69.

(b) *Fells v. Read* (1796), 3 Ves. 70.

Lowther v. Lowther (1806), 13 Ves. 95.

Wood v. Rowcliffe (1847), 2 Ph. 383.

Owing to the improvement in the common law remedies for the recovery of chattels (*ante*, §§ 882, 884), this branch of equitable jurisdiction is now of less importance than before. But (*semble*) it is still in existence. Like all equitable remedies, it will be given only on equitable terms (*Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300).

1483. The owner of a chattel corporeal (not being a possessor), other than the owner of a dog under the Dogs Acts, 1906–1928, is not liable as such for any damage caused by the chattel. *Liabilities of owner*

Whilst it is difficult to find any positive authority for this statement, the absence of any form of action by which a personal liability could be enforced against an owner of chattels, merely as such, is almost conclusive negative authority. Liabilities in respect of cattle, wild animals, and dangerous substances (*ante*, §§ 760–767, 1021–1023) are liabilities attached to “keeping” or possession; and it may well be

doubted whether even the Dogs Act, 1906, though it employs the term "owner", does not really mean "possessor". (See *North v. Wood*, [1914] 1 K.B. 629; *Knott v. L.C.C.*, [1934] 1 K.B. 126 at pp. 140-1, *per* Lord WRIGHT.) Many liabilities in respect of chattels may arise out of contract (e.g. liability to a carrier for inflammable or explosive goods), and some out of tort (e.g. negligence in handling goods or putting them into circulation); but in these the question of ownership is quite immaterial. The owner of animals may, however, be made indirectly to suffer for damage done by them, through the remedy of distress *damage feasant* (*ante*, § 781). And (*semble*) proof of ownership is *prima facie* proof of possession (*Barnard v. Sully* (1931), 47 T.L.R. 557).

*Prohibition
against
alienation*

1484. Any prohibition against alienation attached to the gift of chattels corporeal, other than a restriction affecting a life interest (*post*, § 1691) or the interest of a married woman (§§ 1696-1700), is void.

Bradley v. Peixoto (1797), 3 Ves. 324.

Corbett v. Corbett (1888), 14 P.D. 7.

Re Dugdale, Dugdale v. Dugdale (1888), 38 Ch. D. 176.

The power of the Court to remove the "restraint on anticipation" in the case of the married woman, is now regulated by the Law of Property Act, 1925, s. 169. See *post*, §§ 1696-1700. And, of course, owing to the operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2, cases of valid restraint on anticipation will become increasingly rare.

*Provision for
devolution*

1485. Any attempt, by the transferor of a chattel corporeal, to provide for the devolution of the chattel after the death intestate of the transferee to whom an absolute interest in such chattel has been transferred, is void.

Holmes v. Godson (1856), 8 De G.M. & G. 152.

Re Dixon, Dixon v. Charlesworth, [1903] 2 Ch. 458.

Such an attempt, as has been previously remarked, is, in effect, an attempt to make a testament for the transferee.

TITLE II—SPECIAL KINDS OF OWNERSHIP

1486. The person in whom a franchise of treasure trove, waif, stray, wreck, free fishery, royal fish, or free warren (*ante*, §§ 1154–1166) is vested, has such a property in the chattels being the subject of such franchises, as will enable him to recover such chattels or their value, by seizure or action, from any person unlawfully attempting to convert them to his own use. *Franchise*

Y.B. 21 Hen. VIII (1529), Mich. pl. 2, fo. 9.

Sutton v. Moody (1697), 1 Ld. Raym. 250, *per* Holt, C.J.

Biddulph v. Ather (1755), 2 Wils. 23.

Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831.

Blades v. Higgs (1865), 11 H.L.Cas. 621, at p. 633, *per* Lord Westbury, C.

1487. The person who is entitled *ratione soli* to kill the game on a particular area (§ 1295 *ante*), has a similar property in such game, if it is captured or killed within such area, but not otherwise. *Game*

Sutton v. Moody (1697), 1 Ld. Raym. 250.

Churchward v. Studdy (1811), 14 East, 249.

Rigg v. Lonsdale (Earl) (1857), 1 H. & N. 923.

Blades v. Higgs (1865), 11 H.L.Cas. 621.

1488. Chattels corporeal may be the subject of equitable ownership ; and such equitable ownership will be protected in the same manner, and subject to the same limitations, as legal ownership, except that it will not be protected against a *bonâ fide* purchaser for value who has obtained the legal ownership in such chattels. *Equitable ownership of chattels*

Joseph v. Lyons (1884), 15 Q.B.D. 280.

Hallas v. Robinson (1885), 15 Q.B.D. 288.

There have been very few decisions on the nature of equitable ownership of chattels corporeal ; but, probably, the same principles as those regulating equitable interests in land (*ante*, §§ 1281–1294)

would apply. It should be remembered, however, that even legal ownership (and, therefore, *a fortiori*, equitable ownership) of chattels corporeal may be defenceless against risks which do not affect interests in land, e.g. "apparent possession" of a bankrupt, sale in market overt, etc. These risks have been, or will be, duly noted in their proper places. It is also very doubtful whether the equitable doctrines of constructive and imputed notice of equitable interest (*ante*, § 1293) have any application to chattels corporeal. Certainly the doctrine of constructive notice has not, when these chattels have been made the subject of a commercial transaction (*Manchester Trust v. Furness*, [1895] 2 Q.B. at p. 545, *per* LINDLEY, L.J.; *Lloyds Bank, Ltd. v. Swiss Bankverein* (1913), 108 L.T. 143). Of course, the Statute of Uses had no application to chattels (*Hinson v. Burridge* (1594), Moore (K.B.) 701).

Paraphernalia

1489. *Semble*: personal ornaments and articles of wearing apparel given by a husband to his wife, not for her separate use,^(a) but in order to maintain the credit of his establishment, cannot be alienated by the wife during the marriage,^(b) and remain liable to satisfy the husband's debts during his lifetime and after his decease.^(c) But, if the husband does not alienate them during his lifetime, he cannot deprive his wife of them by testament, nor do they pass to his personal representatives after his decease.^(d)

(a) *Tasker v. Tasker*, [1895] P.1.

(b) *Graham v. Londonderry* (1746), 3 Atk. 393.

(c) But not until all other assets, including land and specific legacies, have been exhausted (*Tynt v. Tynt* (1729), 2 P. Wms. 542).

(d) *Hastings (Lord) v. Douglas* (1634), Cro. Car. 343. (In this case the Court allowed a bequest by the husband; but admitted that, had he died intestate, the chattels would have gone to the widow.)

Tipping v. Tipping (1721), 1 P. Wms. 729.

Seymore v. Tresilian (1737), 3 Atk. 358, *per* Lord HARDWICKE, C.

Since the passing of the Married Women's Property Act, 1882, it has been admittedly more difficult than before to establish a case of paraphernalia; and though, in *Tasker v. Tasker*, *ubi supra*, JEUNE, P., expressed the opinion that the Act had not affected the principles of the subject, this *dictum* was severely criticized by the Court of Appeal in *Masson, Templier & Co. v. De Fries*, [1909] 2 K.B. 831; FARWELL, L.J., stating (p. 833) that "since the Married Women's Property Act, 1882, there can be no question of paraphernalia". The same learned judge, however, in his judgment (p. 839) admits that chattels may in fact be given by a husband to his wife on terms

which correspond with the old position of paraphernalia. And there is nothing to prevent an agreement that the husband shall buy such articles for his wife so that they remain his absolute property (*Rondeau, Le Grand & Co. v. Marks*, [1918] 1 K.B. 75). It is, of course, necessary to distinguish paraphernalia, not only from chattels which are the separate property of the wife, but from ordinary articles of domestic furniture, the property of her husband, and from settled chattels (*ante*, § 1441), which the wife is permitted to use, but in which she has no legal interest. The Law Reform (Married Women and Tortfeasors) Act, 1935, contains no express reference to the subject of a wife's paraphernalia.

1490. Chattels which by special custom are held *Heirlooms* along with the tenure of a freehold estate of inheritance cannot be severed by testament from such estate, but pass beneficially along with the estate.

Co. Litt. 185 b.

Corwen's Case (1612), 12 Co. Rep. 105.

Hill v. Hill, [1897] 1 Q.B. 483, at pp. 494, 495, *per* CHITTY, L.J.

The successor may bring Trover for the heirloom (*Pusey v. Pusey* (1684), 1 Vern. 273, *per* NORTH, L.K.). In ordinary language, the term "heirloom" is used to describe chattels settled to follow so far as possible the devolution of the land (*ante*, § 1453). But these have not the peculiar legal character of heirlooms, e.g. they are pure personalty, and vest absolutely, subject to the settlement, in the first taker of an interest of inheritance in the land who attains twenty-one.

Note on Equitable Rights Generally

It seems desirable, regard being had to the manner in which equitable principles have been introduced into English law, to state here conspicuously that, despite the provisions of the Judicature Acts, all equitable rights, whether in the nature of property or merely equitable claims to relief against transactions vitiated by undue influence, mistake, or other equitable defect (*ante*, §§ 180-193), or of equitable remedies such as specific performance (*ante*, §§ 264-269), are subject to two important conditions, viz. (i) that they can only be enforced in the discretion of the Court and on terms which the Court thinks fair, (ii) that they can never be enforced against *bonâ fide* acquirers for value of the legal title, who had no notice of the equitable right or claim when they gave their value. If this last condition seems strange in the face of the well-known provision of the Judicature Act, 1873 (s. 25 (11)), that "where there is any conflict or variance between the rules of equity and the rules of

the common law with reference to the same matter, the rules of equity shall prevail ", the explanation is, that the rules of equity themselves always did recognize the unimpeachable position of the purchaser for value of the legal title, acquired without notice of equitable claims. In fact, the Judicature Acts, though fusing tribunals, have not by any means fused law and equity.

SECTION X

ACQUISITION OF OWNERSHIP OF CHATTELS CORPOREAL

TITLE I—ABSOLUTE ACQUISITION

1491. Ownership of chattels corporeal may be *Acquisition* acquired absolutely by (i) capture or taking, (ii) production, (iii) delivery, (iv) deed, (v) transfer of bill of lading, (vi) sale, (vii) succession.

1492. Chattels the ownership of which has been *Appropriation* abandoned by their former owner without passing to the possession of other persons,^(a) animals *ferae naturae*, and other *res nullius* become (subject to § 1295 *ante*, and to the rights of the Crown) the property of any person who appropriates them with the intention of acquiring them for his own benefit.

(a) Blackstone, *Comm.* II, 9.

Presumably, the *onus* of proving abandonment, if the former owner put in a claim, would be on the taker or finder. But the finder of an apparently ownerless chattel is entitled to it, by virtue of his possession, as against all persons other than the owner (*Armory v. Delamirie* (1722), 1 Stra. 505; *Bridges v. Hawkesworth* (1851), 12 L.J.(Q.B.) 75); unless he is an employee who has found the chattel on his employer's land while engaged in the work of his employer (*South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 139). It should be carefully noted that "abandonment", for purposes of this paragraph, means abandonment of ownership as well as possession.

1493. The offspring of animals is the property of the owner of the female parent; except in the case of swans, where the offspring belong equally to the owners of both parents. *Young of animals*

Prior of Hisley's Case (1344), Y.B. 18 Edw. III, fo. 48, Mich. pl. 55.

Y.B. 12 Edw. IV, Pasch. (1472), pl. 10, fo. 5.

Case of Swans (1592), 7 Co. Rep. at p. 17 a.

Apparently the Roman doctrine of *specificatio*, though stated as part of English law by text-book writers, has not been judicially accepted (Y.B. 5 Hen. VII, Tr. (1490), pl. 6, fo. 15; *Anon.* (1560), Moore (K.B.) 19). But there are *dicta* in the older case to the effect that if the character of a stranger's material has been wholly changed, the stranger cannot retake it. There are also *dicta* to the effect that, if A mingles his chattels with B's, in such a way that they cannot be distinguished, A loses his property (*Warde v. Æyre* (1615), 2 Bulst. 323).

Delivery

1494. Any delivery of chattels corporeal (*ante*, § 1470) by an owner or person entitled to dispose of the ownership thereof,^(a) with intent to pass the ownership, will confer ownership on the deliverer.^(b) Delivery of current money of the realm (including bank notes) as such, to a person who takes it *bonâ fide* and for valuable consideration, vests the property in the taker; whether the deliveror had any title thereto, or right to deal with the same, or not.^(c)

(a) *Seem*, even by an infant (*Re Burrows, Ex parte Taylor* (1856), 8 De G.M. & G. 254).

(b) *Clark's Case* (1589), 2 Leon. 30, 89.

This decision is interesting as showing that it is immaterial that the delivery is made for a special purpose. It was said by DODDGE, J., in *Wiseman and Denham's Case* (1623), Godb. 329, that mere tender of "a thing which the party ought to have" changes the property. But the Court was divided in opinion whether a good tender had been pleaded.

(c) *Miller v. Race* (1758), 1 Burr. 452.

Clarke v. Shee and Johnson (1774), 1 Cowp. at p. 200, per Lord MANSFIELD, C.J.

If, however, the coins or notes in question were not passed away as money, but as specific chattels, the rule does not apply (*Moss v. Hancock*, [1899] 2 Q.B. 111).

Loan for consumption

1495. The ownership of chattels corporeal which are the subject of a loan for consumption passes to the borrower on the delivery of the chattels to him.

Doctor and Student, ii, 38.

Grounds and Maxims (Noy), 91.

Essay on Bailments (Sir W. Jones), 65.

It is as curious as it is suggestive, that not a single case of a loan for consumption (other than a loan of money, as to which see *ante*, §§ 396-407), appears in the ordinary Reports; though, possibly, a careful search of the Year Books would reveal such cases. For it seems impossible to doubt that, for example, if A lends B a motor tyre on an emergency, he can recover a similar article or its value from B by some form of action.

1496. Gift or exchange of a chattel corporeal, *Gifts without possession* without delivery or deed, is not effectual to pass the ownership;^(a) unless the chattel is already in the possession of the intended donee.^(b)

(a) *Irons v. Smallpiece* (1819), 2 B. & Ald. 551.

— *Cochrane v. Moore* (1890), 25 Q.B.D. 57 (overruling *Re Harcourt, Danby v. Tucker* (1883), 31 W.R. 578, and *Re Ridgway* (1885), 15 Q.B.D. 447).

The rule is the same in *donationes mortis causæ* (*post*, §§ 2027-2031). See *Bunn v. Markham* (1816), 2 Marsh. 532, approved in *Irons v. Smallpiece*, *ubi supra*.

(b) *Cain v. Moon*, [1896] 2 Q.B. 283.

Re Weston, Bartholomew v. Menzies, [1902] 1 Ch. 680.

Rawlinson v. Mort (1905), 93 L.T. 555.

Re Stoneham, Stoneham v. Stoneham, [1919] 1 Ch. 149.

The first two of these were cases of *donatio mortis causæ*. But it was assumed in both that the rule applied also to gifts *inter vivos*.

1497. Ownership of a chattel corporeal may be *Deed* transferred (subject to the Bills of Sale Acts, 1878 and 1882) by a deed expressing an unequivocal intention to that effect, without delivery of the chattel, and without valuable consideration.^(a) Acceptance of such ownership on the part of the intended transferee will be presumed; unless there is evidence of disclaimer by him.^(b)

(a) Y.B. 7 Edw. IV (1467), Mich., fo. 20 B. pl. 21.

Butler v. Baker (1591), 3 Co. Rep. at p. 26 b.

Siggers v. Evans (1855), 5 E. & B. 367.

Standing v. Bowring (1885), 31 Ch. D. 282. (This was a case of stock; but the general rule was affirmed.)

Cochrane v. Moore (1890), 25 Q.B.D. 57, at pp. 67, 68, *per* FRY, L.J.

(b) This is the general rule with regard to transfer by deed (*ante*, § 1360). *London & County Banking Co., Ltd. v. London & River Plate Bank* (1888), 21 Q.B.D. 535, at p. 541, *per* LINDLEY, L.J.

One result of the rule stated in this paragraph is, that a donor

cannot revoke a gift by deed, even though there is no acceptance or delivery, if the donee was intended to take any beneficial interest under it. It is otherwise if the donee is a mere mandatory to carry out the intentions of the donor (*Siggers v. Evans*, *ubi supra*). It appears by *Flory v. Denny* (1852), 7 Exch. 581, that the ownership of chattels may be transferred by writing not under seal, or even by word of mouth, for value. *Quære* : Is this anything more than a sale ? Such a document would now clearly fall within the provisions of the Bills of Sale Acts.

*Future-
acquired
chattels*

1498. A purported assignment by deed of chattels corporeal of which the assignor is not owner, and over which he has no present power of disposition, does not convey the legal ownership of such chattels ; even if the assignor subsequently acquires the ownership or power to dispose of them.^(a) But an assignment by deed or writing, if made for valuable consideration, of such chattels will be treated as a contract to assign, and, if such as the Court will enforce specifically (*ante*, §§ 264–269), will pass the equitable ownership of such chattels to the assignee, so soon as the assignor acquires such ownership or power.^(b)

(a) *Lunn v. Thornton* (1845), 1 C.B. 379.

Holroyd v. Marshall (1862), 10 H.L.Cas. 191, at p. 211, *per* Lord WESTBURY, C.

(b) *Langton v. Horton* (1842), 1 Hare, 549.

Holroyd v. Marshall, *ubi supra*.

Collyer v. Isaacs (1881), 19 Ch. D. 342.

As in the case of equitable interests in land, this equitable ownership will not be enforceable against a purchaser for value of the legal ownership in the chattels without notice of the equity (*Joseph v. Lyons* (1884), 15 Q.B.D. 280 ; *Hallas v. Robinson* (1885), 15 Q.B.D. 288). *Semble* : however, subject to this qualification, a mere *spes successionis* may now be assigned by writing for valuable consideration (*Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1915] 2 Ch. 345). As to the rule that chattels not in existence or not the property of the assignor, at the time of the assignment were not assignable at common law, there was and (*semble*) still is an exception in respect of such chattels in which the assignor has a potential interest, e.g. all the wool from the sheep which he has (*Grantham v. Hawley* (1615), Hob. 132 ; *Petch v. Tutin* (1846), 15 M. & W. 110).

*Absolute bill
of sale*

1499. Subject to § 1500, an assignment by deed

of chattels which remain in the possession of the assignor will be void against the trustee in bankruptcy of the assignor, and against execution creditors of the assignor unless it complies with the requirements of s. 8 of the Bills of Sale Act, 1878.

Bills of Sale Act, 1878, s. 8.

The requirements of the section are (1) attestation by a solicitor stating that the effect has been explained by him to the assignor, (2) registration within seven days of execution (there is a provision in s. 9 against evasion of the Act by the execution of a succession of assignments within successive periods of seven days), (3) statement of the consideration for which the assignment was given. It should be noted that by the defining section (s. 4) of the Act, the term "bill of sale" includes many documents which would not, apparently, pass the ownership in the goods at all; and it would seem that the existence of unregistered documents of such kind is not fatal to a transaction, unless it is necessary to rely upon them in proof of title (*Manchester, Sheffield & Lincolnshire Rly. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; *Charlesworth v. Mills*, [1892] A.C. 231). An absolute assignment which does not comply with the requirements of the Act of 1878, may, nevertheless, be valid as between the parties (*Tuck v. Southern Counties Deposit Bank* (1889), 42 Ch. D. 471). But, subject to this reservation, absolute assignments take effect in order of registration, not of date (Bills of Sale Act, 1878, s. 10 *ad fin.*). It was laid down generally in *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, that corporations, at any rate limited companies within the Companies Acts, are not within the provisions of the Bills of Sale Act, 1878. But it is right to point out that the judgment of the Court dealt mainly, if not entirely, with securities, and especially debenture securities.

1500. The provisions of the Bills of Sale Act, 1878, do not apply to assignments for the benefit of the creditors of the assignor, marriage settlements, transfers of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or other documents of title used in the ordinary course of business for the transfer of goods. *Exempted transactions*

Bills of Sale Act, 1878, s. 4.

*Transfers of
shares in
ships*

1501. The ownership of a registered British ship or of any share therein can only be transferred by an attested bill of sale, containing the particulars required by the Merchant Shipping Acts, and registered at the ship's port of registry.

Merchant Shipping Act, 1894, ss. 24-26.

Changes of ownership arising from marriage, death, bankruptcy, or causes other than voluntary transfer, must also be registered (ss. 27-29); and no equitable interest or any notice of trust may be registered. But equitable interests in ships may be enforced personally against the legal owners in the same way as other equitable interests in personalty (ss. 56, 57). Certain small vessels engaged in coasting and river service are exempt from registration (s. 3).

*Bills of
lading*

1502. An owner or person entitled to dispose of the ownership of goods ^(a) in course of transit by sea, or awaiting delivery in the hands of the shipowner after such transit, ^(b) may pass the ownership therein by indorsement and delivery to another person of a bill of lading ^(c) of such goods, or, if the bill of lading is indorsed in blank, by delivery only of such bill. ^(d) Such delivery, if made for valuable consideration, will be effectual against the right of stoppage *in transitu* of an unpaid vendor of the goods. ^(e)

(a) The holder of a bill of lading is not in the position of the holder of a bill of exchange. "The transfer of the document of title . . . has no greater effect at common law than the transfer of the actual possession" (*Cole v. North Western Bank* (1875), L.R. 10 C.P. 354, at p. 363, *per* BLACKBURN, J.).

(b) *Barber v. Meyerstein* (1870), L.R. 4 H.L. 317.

(c) *Semble*: a bill which makes the goods deliverable only to the consignee cannot be transferred at law by indorsement or delivery (*Henderson & Co. v. Comptoir d'Escompte de Paris* (1873), L.R. 5 P.C. 253). But it would seem that delivery of it would pass an equitable title.

(d) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63, ultimately confirmed on appeal.

Sanders v. Maclean (1883), 11 Q.B.D. 327, at p. 341, *per* BOWEN, L.J.

(e) *Lickbarrow v. Mason*, *ubi supra*.

*Effect of
transfer*

1503. The consignee of goods named in a bill of lading, and every indorsee thereof to whom the

property in the goods mentioned in the bill passes by reason of the consignment or indorsement, acquires all rights, and is subject to all liabilities, in respect of such goods, as if the contract contained in the bill had been made with himself.^(a) Every bill of lading, in the hands of a consignee or indorsee for value, is conclusive evidence, against the person signing the bill, of the shipment and condition of such goods.^(b)

(a) Bills of Lading Act, 1855, s. 1.

It should be noted that this section only applies where the property in the goods passes. It is clear from the Factors Act, 1889, s. 3, that a mere pledge of the goods covered by a bill of lading may be effected by dealing with the bill ; and the difficulty of deciding whether a dealing does or does not pass the property is illustrated by the leading case of *Sewell v. Burdick* (1884), 10 App. Cas. 74 (*post*, Title II, § 1515). The paragraph only applies to the actual holder of the bill ; e.g. the consignee or an indorsee who indorses over before the arrival of the cargo loses both his rights and liabilities under the bill (*Smurthwaite v. Wilkins* (1862), 31 L.J. (C.P.) 214).

(b) Bills of Lading Act, 1855, s. 3.

Compania Naviera Vasconzada v. Churchill and Sim, [1906] 1 K.B. 237.

Martineau, Ltd. v. Royal Steam Packet Co., Ltd. (1912), 106 L.T. 638.

1504. *Semble* : the ownership of chattels corporeal is not acquired by long possession ; even though the action of the owner against the possessor for the time being is barred by lapse of time. *Long possession*

Putt v. Roster (1682), 2 Mod. Rep. at p. 319, *per Curiam*.

Miller v. Dell, [1891] 1 Q.B. 468, at p. 471, *per Lord Esher*, M.R.

London and Midland Bank v. Mitchell, [1899] 2 Ch. at p. 166, *per STIRLING, J.* (things in action).

As to whether an owner may retake by force after his action is Statute-barred, see *Pollock & Wright, ibid.* pp. 114, 115 ; Holdsworth, *History of English Law*, vol. 7, pp. 463, 464 ; Ames, *Anglo-American Essays in Legal History*, vol. 3, p. 569 ; Jenks, 49, L.Q.R. 215.

TITLE II—ACQUISITION BY WAY OF SECURITY

*Chattels as
securities*

1505. Chattels corporeal may be made a security for the payment of money by (i) mortgage, (ii) pledge, (iii) lien.

*Mortgage of
chattels*

1506. Subject to the Bills of Sale Acts, 1878 and 1882, a mortgage of chattels corporeal may be effected by any means by which an absolute transfer of ownership of such chattels may be made (*ante*, Title I) ; provided that there is an intention to pass the ownership of the chattels by way of security for the payment of money. In such a case, the transferor or his successor in title will be able to redeem the chattels on payment of the amount secured, with interest, and costs, if any.

Ryall v. Rolle (1749), 1 Atk. 165.

Reeves v. Capper (1838), 5 Bing. (N.C.) 136.

Meyerstein v. Barber (1866), L.R. 2 C.P. 38, at p. 51, *per* WILLES, J.

Reeves v. Barlow (1884), 12 Q.B.D. 436.

Re Hardwick, Ex parte Hubbard (1886), 17 Q.B.D. 690, at p. 696, *per* Lord ESHER, M.R.

Re Morritt, Ex parte Official Receiver (1886), 18 Q.B.D. 222, at pp. 232-4.

As a general rule, securities on chattels in which the possession passes to the creditor are effected by way of pledge, which does not transfer ownership, but only possession (see *post*, §§ 1514-1523). But if it were held that a delivery of chattels by way of security could not transfer the ownership, then the curious result would follow, that an assignment where the assignor retained possession would (if the requirements of the Bills of Sale Acts were complied with) be more efficacious than one where he did not. In *Flory v. Denny* (1852), 7 Exch. 581, it was held that a mortgage of chattels might be made by unsealed writing, without delivery.

*Security bill
of sale*

1507. A bill of sale, given by way of security for the payment of money,^(a) will, if executed on or after 1st November, 1882,^(b) be void (wholly or partially)

unless it complies with the requirements of the Bills of Sale Acts, 1878 and 1882.^(a)

- (a) Bills of Sale Act, 1882, s. 3. (For the definition of "bill of sale" see Act of 1878, s. 4; and *ante*, § 1499.)

Whether a "hire-purchase agreement" is a bill of sale for the purposes of the Acts, depends upon whether it is a genuine transaction under which the property in the goods remains in the vendor, or a security for money effected by means of an assignment to the creditor followed by a pretended hiring to the debtor (*McBain v. Wallace & Co.* (1881), 6 App. Cas. 588; *McEntire v. Crossley Brothers*, [1895] A.C. 457; *Maas v. Pepper*, [1905] A.C. 102). If it is the former, a sale by the hirer before the property vests in him may be treated (if not forbidden by the agreement) as an assignment of contractual rights (*Whiteley v. Hilt*, [1918] 2 K.B. 808).

- (b) Bills of Sale Act, 1882, s. 2.

- (c) *Ibid.* ss. 4, 8, 9.

These requirements are set out in the Bills of Sale Acts, 1878 and 1882, and are (i) an inventory of the chattels comprised in the bill, (ii) attestation of the bill by a credible witness not a party, (iii) registration within seven days of execution, or, if executed abroad, of arrival in England in due course, (iv) true statement of the consideration, (v) form specified in the Schedule to the Act. Failure to observe the first requirement (s. 4) makes the bill, as to any chattels not specifically described, void "except as against the grantor"; the omission of any of the requirements (ii), (iii), and (iv), makes the transaction totally void as a bill of sale, though, probably, not as a personal loan (*Heseltine v. Simmons*, [1892] 2 Q.B. 547); the omission of requirement (v), which, however, only applies where the money secured is to be paid *by the grantor*, avoids the bill altogether, and no action can be brought on the transaction which it embodies (*Smith v. Whiteman*, [1909] 2 K.B. 437; *Hall v. Whiteman*, [1912] 1 K.B. 683). It should be carefully noted that, owing to the difference in wording between s. 8 of the Act of 1878 and s. 8 of the Act of 1882, and to the operation of s. 4 of the Act of 1878, the earlier statute applies only to (absolute) bills where the grantor retains possession, while the latter applies to all (security) bills where possession does not pass to the grantee. The object of registration (which, though the Act of 1882 does not expressly require it, must be repeated every five years (*Fenton v. Blythe* (1890), 25 Q.B.D. 417; but see *Re Tooth, Trustee v. Tooth*, [1934] Ch. 616), is, of course, to secure publicity; and anyone may inspect and take copies of registered bills of sale, on payment of fees (Act of 1878, s. 16; 1882, s. 16). The provisions of the Act of 1882 are expressly (s. 17) excluded from affecting debentures issued by incorporated companies; and, probably, they do not apply to any securities given by a company which require registra-

tion under the Companies Act, 1929 (*Re Standard Manfg. Co.*, [1891] 1 Ch. 627, at p. 648, *per* BOWEN, L.J.; *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212). But these decisions were on the Companies (Consolidation) Act of 1908.

*Future-
acquired
chattels*

1508. A bill of sale given by way of security for the payment of money is void, except as against the grantor, in respect of any chattels described in it of which, at the time of the execution of the bill of sale,^(a) the grantor was not the owner.^(b)

(a) There are exceptions for (i) growing crops, and (ii) fixtures, plant, or trade machinery substituted for those specified in the bill of sale (s. 6).

(b) Bills of Sale Act, 1882, s. 5.

It is sufficient if the grantor is equitable owner of the chattels, e.g. a person who has already given a bill of sale of his goods can give a second, by virtue of his right of redemption (*Thomas v. Searles*, [1891] 2 Q.B. 408). On the other hand, a bare legal owner can also give a valid bill of sale by way of security (*Re Sarl, Ex parte Williams*, [1892] 2 Q.B. 591). But a mere bailee of goods with an option to purchase but no obligation so to do, is not the "true owner" (*Lewis v. Thomas*, [1919] 1 K.B. 319).

*Bills for less
than £30*

1509. Every bill of sale given by way of security in consideration of any sum under thirty pounds is void.

Bills of Sale Act, 1882, s. 12.

*Subject to
distress for
taxes and
parochial
rates*

1510. A bill of sale given by way of security does not protect the chattels comprised in it from distress for taxes, or poor or other parochial rates;^(a) nor does it afford any protection against a distress for rent.^(b)

(a) Bills of Sale Act, 1882, s. 14.

Apparently it protects against general district rates, which are not parochial rates (*Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212), and against an execution on a judgment for rates of any kind (*Wimbledon Local Board v. Underwood*, [1892] 1 Q.B. 836).

(b) Law of Distress Amendment Act, 1908, s. 4 (1).

*And to
"order and
disposition"
clause*

1511. A bill of sale to which the Bills of Sale Act, 1882, applies, will not, even though duly regis-

tered, prevent the chattels comprised therein being in the possession, order, or disposition of the grantor, in his trade or business, for the purposes of the Bankruptcy Act, 1914.

Bills of Sale Act, 1882, s. 15.

Bankruptcy Act, 1914, ss. 37, 38.

Swift v. Pannell (1883), 24 Ch. D. 210.

Re Ginger, Ex parte London and Universal Bank, [1897] 2

Q.B. 461.

Hollinshead v. Egan, Ltd., [1913] A.C. 564.

This is believed to be the effect of s. 15 of the amending Act, which repeals s. 20 of the Act of 1878, so far as security bills only are concerned (Act of 1882, s. 3). It is, perhaps, unnecessary to call attention to the endless difficulties raised by the wording of the Act of 1882. It may be pointed out, however, that, if the grantee of a security bill has the right to seize the chattels comprised in it, and can do so before he has received notice of an act of bankruptcy on the part of the grantor, and before a receiving order has been made, the chattels will cease to be in the "apparent possession" of the bankrupt (*Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70 (on the Bankruptcy Act of 1869)). A general assignment of book debts is now also within this provision (Bankruptcy Act, 1914, s. 43).

1512. The grantee of a bill of sale given by way of security may not seize or take possession of the chattels comprised therein for any other than (one of) the following causes :—

- (i) default in payment of the sum or sums of money secured, at the time therein provided for payment, or in performance of any agreement in the bill necessary for maintaining the security ;
- (ii) bankruptcy of the grantor, or distress on the goods for rent, rates, or taxes ;
- (iii) fraudulent removal of any of the goods "from the premises" ;
- (iv) failure by the grantor, without reasonable excuse, upon demand in writing by the

*Conditions
of seizure*

grantee, to produce his last receipts for rents, rates, and taxes ;

- (v) levy of execution against the goods of the grantor under any judgment at law.

And, even when the chattels have been rightfully seized by the grantee, they may not be sold, or removed from the premises on which they were seized, until after the expiration of five clear days from the seizure ; during which time the grantor may apply to the Court or a Judge in Chambers to restrain the removal or sale.

Bills of Sale Act, 1882, ss. 7, 13.

The prohibition against removal or sale within five days applies to all security bills, whenever executed (s. 13). Default in payment of interest secured by the bill of sale is a ground of seizure (*Ex parte Ellis*, [1898] 2 Q.B. 79).

*Registration
not construc-
tive notice*

1513. A purchaser for value of the legal property in chattels corporeal, an equitable interest in which has previously been created in favour of another person by a registered bill of sale, is not, by the mere fact of registration, deemed to have constructive notice of the existence of the equitable interest.

Joseph v. Lyons (1884), 15 Q.B.D. 280.

Hallas v. Robinson (1885), 15 Q.B.D. 288.

Re Tooth, Trustee v. Tooth, [1934] Ch. 618.

And consequently, the fact that the bill of sale has not been registered as required by § 1499, n., is immaterial.

Pledge

1514. A pledge of chattels corporeal is effected by delivery of such chattels to, or to a person on behalf of, the creditor ("pledgee"), without intent to pass the ownership in the chattels, but with intent that such chattels shall be a security for the payment of money.

Meyerstein v. Barber (1866), L.R. 2 C.P. 38, at p. 51, *per* WILLES, J.

Hilton v. Tucker (1888), 39 Ch. D. 669.

Grigg v. National Guardian Assurance Co., [1891] 3 Ch. 206.

Though often spoken of as a "special property", the interest of

the pledgee is really only possessory (*Attenborough v. Solomon*, [1913] A.C. 76, at p. 84, *per* HALDANE, C.). In *The Odessa, The Woolston*, [1916] 1 A.C. 145, Lord MERSEY at p. 158, criticised the use of the term "special property" and preferred the term "special interest", for it gives the pledge no more than a *jus in rem* such as a person having a lien possesses, except that he may have a power of sale.

1515. A pledge of goods in course of transit by sea can be effected by a deposit of the bill of lading with the pledgee with that intent. Whether such deposit is intended merely as a pledge, or as a transfer of the ownership of the goods, is a question of fact in each case. *Pledge by deposit of bill of lading*

Sewell v. Burdick (1884), 10 App. Cas. 74.

1516. A mortgagee or a pledgee of chattels corporeal has, unless the sum secured has been paid or tendered, a right to sell the chattels at any time after the day fixed for payment,^(a) or, if no day has been fixed, at any time after reasonable notice requiring payment has been given to the mortgagor or pledgor.^(b) A mortgagee (but not a pledgee) has also a right of foreclosure (*ante*, § 1374) in similar circumstances.^(c) *Pledgee's right of sale*

(a) *Capper v. Dickinson* (1615), 1 Roll. Rep. 215.

Pigot v. Cubley (1864), 15 C.B.(N.S.) 701.

Donald v. Suckling (1866), L.R. 1 Q.B. 585, at p. 604, *per* MELLOR, J.

(b) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690, at p. 698, *per* BOWEN, L.J.

Re Morritt, Ex parte Official Receiver (1886), 18 Q.B.D. 222, at pp. 232-4, *per* CURIAM.

Deverges v. Sandeman, Clark & Co., [1902] 1 Ch. 579, at pp. 592-3, *per* STIRLING, L.J.

Stubbis v. Slater, [1910] 1 Ch. 632, at p. 639, *per* COZENS-HARDY, M.R.

Of course, in either case, any surplus realized by the sale goes to the mortgagor or pledgor unless he has transferred his interest in the chattels (*Ponsolle v. Webber*, [1908] 1 Ch. 254; *The Odessa, The Woolston*, [1916] 1 A.C. 145, P.C.).

(c) *Garter v. Wake* (1877), 4 Ch. D. 605.

Harrold v. Plenty, [1901] 2 Ch. 314.

These were both cases of things in action. But the language of the Court applies equally to chattels corporeal.

Transfer of security

1517. A mortgagee or pledgee of chattels corporeal is entitled, even before the day for payment of the money secured has arrived, to dispose of his own interest therein, either absolutely or by way of security, subject to the rights of the mortgagor or pledgor.^(a) But, until a lawful sale for the purpose of realizing his security has been effected by the mortgagee or pledgee, the mortgagor or pledgor has (subject to § 1516) a right of redemption.^(b)

- (a) *Donald v. Suckling* (1866), L.R. 1 Q.B. 585.
France v. Clark (1883), 22 Ch. D. 830.

If the mortgagee or pledgee attempts to dispose of the chattels absolutely before his right to do so accrues, he will be guilty of conversion (*ante*, §§ 856-874); though, probably, he will be allowed to set off his debt against the value of the chattels (*Johnson (Assignee of Cumming) v. Stear* (1863), 15 C.B.(N.S.) 330).

- (b) *Ratcliff v. Davis* (1610), Yelv. 178.
Kemp v. Westbrook (1749), 1 Ves. Sen. 278.

According to Lord HARDWICKE in the latter case, no lapse of time bars the pledgor's claim to redeem a pledge; and the Limitation Act, 1939, provides no bar. In both cases it was said that the right to redeem is restricted to the lifetime of the pledgor, and does not pass to his executor. *Sed quære*; this now seems inconsistent with the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, in that causes of action vested in the deceased survive for the benefit of his estate. In particular, the Pawnbrokers Act, 1872, s. 9, expressly gives the executors of a deceased pawnor the right to redeem in the case of a pledge to which that Act applies. As to the power of the Court to review a pledge-contract entered into by a money-lender, on the ground of harshness, see Moneylenders Act, 1927, ss. 10, 15.

Liabilities of pledgee

1518. A pledgee is not liable for damage to the chattels pledged not arising from his own negligence;^(a) and he may add to the debt all expenses reasonably incurred by him in preserving such chattels from depreciation or loss.^(b) But a pledgee may not make any use of the chattels pledged; unless such user would not be prejudicial to the chattels.^(c)

- (a) *Ratcliff v. Davis* (1610), Yelv. 178; 1 Bulst. 29.
Coggs v. Bernard (1703), 2 Ld. Raym. 909, at p. 917, *per* Holt, C.J.

If, however, the pledgee detains the chattels after payment or tender of the amount due, he becomes absolutely liable (*Coggs v. Bernard*, *ubi supra* ; *Anon.* (1693), 2 Salk. 522).

(b) *Holt*, C.J., in the case of *Coggs v. Bernard*, *ubi supra*, limits the compensation for expenses to user of the chattels. *Sed quare*.

(c) *Mores v. Conham* (1610), *Owen*, 123, at p. 124, *per Curiam*.

Coggs v. Bernard, *ubi supra*.

Cooke v. Haddon (1862), 3 F. & F. 229.

Sometimes the qualification is stated more cautiously as "unless such user would be beneficial"; and both the authorities quoted state that a pledgee who uses the pledge is absolutely responsible for its safety.

1519. Notwithstanding § 880 *ante*, a pledgee *Jus tertii* may set up a *jus tertii* in a claim against him by the *of pledgee* pledgor for a return of the goods.

Cheesman v. Exhall (1851), 6 Exch. 341.

Singer Manfg. Co. v. Clark (1879), 5 Ex. D. 37, at p. 42, *per Curiam*.

Cheesman v. Exhall may, however, be explained as a case of fraud. Of course, a pledgor cannot (in the absence of special circumstances) give any better title to the pledgee than he himself has (*Hoare v. Parker* (1788), 2 Term Rep. 376 ; *Attenborough v. Solomon*, [1913] A.C. 76).

1520. Notwithstanding the existence of the *Alienation by* pledge, the pledgor may alienate the chattel pledged ; *pledgor* and the alienee will be entitled to redeem the chattel on payment of the amount due on the pledge.

Franklin v. Neate (1844), 13 M. & W. 481.

1521. Pledges in the possession of a bankrupt *Not in* pledgee at the commencement of his bankruptcy do *"order and* not pass to his trustee ;^(a) and pledges are not liable *disposition"* to be distrained for rent owing by a pawnbroker on *of pledgee* whose premises they are situated.^(b)

(a) There seems to be no actual decision on pledges. But it is submitted that, if the pledgee were a pawnbroker, there would be no reputation of ownership (see expressions of Lord SELBORNE, C., in *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520), while, if he were not, the pledge would not be "in the order and disposition of the bankrupt in his trade or business". Of course, the rights of the pledgee pass to his trustee in bankruptcy.

(b) *Swire v. Leach* (1865), 18 C.B. (N.S.) 479.

On the other hand, the sheriff under a Fi. Fa. may sell the interest of the pawnbroker, and (*semble*) of any pledgee whose period for redemption has expired (*Re Rollason, Rollason v. Rollason, Halse's Claim* (1887), 34 Ch. D. 495).

*Pawn-
brokers Act*

1522. Pledges given to secure loans by pawnbrokers of sums of forty shillings or under, are subject to the provisions of the Pawnbrokers Act, 1872 ;^(a) pledges given to secure loans by pawnbrokers above forty shillings, but not above ten pounds, are also subject to the provisions of the same statute, unless a special contract is made between the parties in manner provided by the statute.^(b)

(a) Pawnbrokers Act, 1872, s. 10 (1).

(b) *Ibid.* ss. 10 (1), 24.

As between the parties, the chief differences between the statutory and the common law pledge are that the former (1) must be accompanied by a pawn-ticket, the production of which is (except in special cases) necessary and sufficient authority for delivery up of the pledge on redemption, (2) is redeemable within a year and seven days, (3) if for not more than ten shillings becomes the absolute property of the pawnbroker if not redeemed within that time, (4) if for ten shillings or upwards remains redeemable until sale, and can only be sold by public auction under statutory regulations, (5) permits of only a limited rate of profit being charged by the pawnbroker (*ibid.* ss. 14-19). Special provisions apply in the case of moneylenders (Moneylenders Act, 1927, ss. 10, 15).

*Return of
pledge for
special
purpose*

1523. The fact that a pledgee delivers the chattels pledged to the pledgor for a special purpose, does not necessarily deprive the pledgee of his interest in the chattels ; even when the special purpose is to effect a sale of the chattels.

North Western Bank v. Poynter, Son and MacDonalds, [1895] A.C. 56.
Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association, [1938] 2 K.B. 147.

Needless to say, the pledgee would not be able to set up his right to the goods against the purchaser who had bought at a sale authorized by the pledgee. But the pledgee's right would survive against the general creditors of the pledgor.

1524. *Semble* : the doctrines of Tacking^(a) (*ante*, § 1372), Consolidation^(b) (§ 1391), and Clogging the Equity^(c) (§ 1389), apply to mortgages of chattels corporeal. But the doctrine of Consolidation must not be used to defeat the policy of the Bills of Sale Acts.^(d)

(a) *Re Salmon, Ex parte Trustees*, [1903] 1 K.B. 147.

(b) *Spalding v. Thompson* (1858), 26 Beav. 637.

Cracknell v. Fanson (1879), 11 Ch. D. 1.

(c) *Bradley v. Carritt*, [1903] A.C. 253.

Samuel v. Farrah Timber and Wood Paving Corp., [1904] A.C. 323.

The authorities are very scanty ; and the cases quoted were all concerned with things in action. But there seems to be no difference in principle between the two kinds of securities.

(d) *Chesworth v. Hunt* (1880), 5 C.P.D. 266.

It is fairly clear that these doctrines have no general application to pledges ; because the right of the pledgor to redeem is not merely equitable, but legal (*Crickmore v. Freeston* (1870), 40 L.J. (Ch.) 137). The Pawnbrokers Act, 1872, s. 22, seems, however, to apply the principle of Consolidation, to a limited extent, to pledges. Probably the provisions of the Law of Property Act, 1925, ss. 93 and 94, do not apply to mortgages of pure personality (see s. 94 (4)).

1525. A lien on chattels corporeal consists of the right to retain possession of such chattels until a certain claim or certain claims of the possessor is or are discharged. For the purposes of this Title, the person claiming to retain possession is called the “creditor”, and the person entitled, subject to the lien, to possession of the chattels, is called the “debtor”, whether or not the relation of debtor and creditor legally exists between such persons.^(a) It is not necessary that the debtor should be the owner of the chattels.^(b)

(a) *Jackson v. Cummins* (1839), 5 M. & W. 342.

Shaw v. Neale (1858), 6 H.L.Cas. 581, at p. 601, *per* Lord CHELMSFORD, L.C.

(b) *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K.B. 307, C.A.

Liens independent of possession may exist in respect of goods, by virtue of maritime law ; but these, as being part of the Law Merchant, are not dealt with in this work. The liens of trustees will be treated in a later Section. For liens on land, see *ante*, § 1400. There can

be no equitable lien on goods, independently of possession, analogous to the unpaid vendor's (or purchaser's) lien on land (*Lloyds Bank, Ltd. v. Swiss Bankverein* (1913), 108 L.T. 143; *Transport & General Credit Corpn., Ltd. v. Morgan*, [1939] Ch. 531). To create a lien as against the owner, it is necessary that the person who delivered the chattels to the person claiming a lien should have been in lawful possession of them (*Bowmaker, Ltd. v. Wycombe Motors, Ltd.*, [1946] K.B. 505).

"General"
and "particular"
liens

1526. Where a creditor is entitled to retain any chattels of the debtor in his possession to satisfy all the liabilities towards him of the debtor, or all the liabilities of a certain kind, such right is called a "general lien".^(a) Where the creditor's right is only to detain a specific chattel or chattels to satisfy liabilities arising in connection with such chattel or chattels, his right is said to be a "particular lien".^(b) Both general and particular liens may arise (i) by operation of law,^(c) (ii) by agreement of the parties.^(d)

(a) *Frith v. Forbes* (1862), 4 De G.F. & J. 409, at p. 419, *per* KNIGHT BRUCE, L.J. at p. 420, *per* TURNER, L.J.

(b) *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275, at p. 289.

(c) See *post*, §§ 1527-1530.

(d) *Gladstone v. Birley* (1817), 2 Mer. 401, at p. 404, *per* GRANT, M.R. (general lien).

Castellain v. Thompson (1862), 13 C.B. (N.S.) 105 (particular lien).

General
liens

1527. A general lien arises by operation of law in the cases of innkeepers,^(a) factors,^(b) wharfingers,^(c) packers,^(d) bankers,^(e) stock-brokers,^(f) and solicitors,^(g) who are entitled to retain possession of all chattels coming to their hands as such (other than the goods of a third person sent to the debtor for a temporary purpose known to them^(h)) until all their claims against the owners thereof in such capacities are satisfied. Any similar lien may be claimed by virtue of special custom clearly proved.⁽ⁱ⁾

(a) *Mulliner v. Florence* (1878), 3 Q.B.D. 484.

The lien of an innkeeper is sometimes spoken of as a "particular" lien, but in so far as his right is to detain his guests' chattels in respect of all services rendered and not in respect of services performed on those chattels, it may be regarded in this sense as a

"general" lien. And the lien extends to chattels not belonging to the guest (*Robins & Co. v. Gray*, [1895] 2 Q.B. 501). (See *post*, § 1529, n.).

Angus v. McLachlan (1883), 23 Ch. D. 330.

- (b) *Kinloch v. Craig* (1789), 3 Term Rep. at p. 122, *per* ASHHURST, J.
Bock v. Gorrisen (1860), 2 De G.F. & J. 434.
Stevens v. Biller (1883), 25 Ch. D. 31.

This lien is sometimes called a "consignees" lien, e.g. in *Frith v. Forbes*, *ubi supra*. It is important to note that, if a factor receives goods knowing that they have been made subject to a charge in favour of a third party, he cannot set up his general lien against such charge (*ibid.*).

- (c) *R. v. Humphery* (1825), M'Cle. & Yo. 173. (This case shows that the lien prevails against the Crown claiming the goods by extent.)

But the wharfinger's lien does not cover his charges for labourage or warehousing; unless there is a special custom to that effect binding the owner of the goods (*Holderness v. Collinson* (1827), 7 B. & C. 212). And where, by custom, the importer has a certain period within which to pay the wharfage charges, during which time he may remove the goods, a person who purchases during such period is protected against the wharfinger's lien; even though the goods are lying at the wharf when the period expires (*Crawshay v. Homfray* (1820), 4 B. & Ald. 50).

- (d) *Ex parte Deeze* (1748), 1 Atk. 228.
Re Witt, Ex parte Shubbrook (1876), 2 Ch. D. 489.
- (e) *Davis v. Bowsher* (1794), 5 Term Rep. 488.
Brandao v. Barnett (1846), 12 Cl. & Fin. 787.

The latter case shows that the lien does not extend to chattels delivered to the bankers for a special purpose, inconsistent with the right. Nor does it extend to securities in a box the contents of which have not been put into the possession of the bankers.

- (f) *Jones v. Peppercorne* (1858), John. 430.
Re London & Globe Finance Corpn., [1902] 2 Ch. 416.
Hope & Co. v. Glendinning, [1911] A.C. 419.
- (g) *Cowell v. Simpson* (1809), 16 Ves. 275.
Re Taylor, Stileman and Underwood, Ex parte Payne Collier, [1891] 1 Ch. 590, at p. 596, *per* LINDLEY, L.J.
Re Morris, [1908] 1 K.B. 473.

The lien, however, only extends to the professional charges of the solicitor, not to ordinary advances or loans (*Re Taylor, Stileman, and Underwood, Ex parte Payne Collier, ubi supra*); and it is restricted to the client's interest in the subject-matter of documents in respect of which it is claimed (*Re Llewellyn*, [1891] 3 Ch. 145). But all who take under the client are bound by it, e.g. *cestuis que trustent* whose trustee's deeds are subject to a lien by the trustee's solicitors acting as such (*Re Dee Estates, Wright v. Dee Estates, Ltd.*, [1911] 2 Ch. 85).

- (h) *Breadwood v. Granara* (1854), 10 Exch. 417, *per Curiam*.
 (j) *Bock v. Gorrisen* (1860), 2 De G.F. & J. at p. 443, *per Lord CAMPBELL, C.* The cases show, however, that the Court does not favour such a custom (*Rushforth v. Hadfield* (1805), 6 East, 519).

Some text-books state that dyers are entitled to a general lien; and *Saxill v. Barchard* (1801), 4 Esp. 53 is in favour of that view. But the balance of authority seems to be against it; though the claim may, doubtless, be established by proof of the existence of a special custom affecting a particular locality (*Green v. Farmer* (1768), 4 Burr. 2214; *Close v. Waterhouse* (1802), 6 East, 523, n.; *Plaice v. Allcock* (1866), 4 F. & F. 1074; *Cassils & Co. and Sassoon & Co. v. Holden Wood Bleaching Co., Ltd.* (1914), 84 L.J. (K.B.) 834).

*Carriers,
warehouse-
men, and
agents*

1528. Apart from statute, agreement, or special custom, neither a common carrier,^(a) nor a public warehouseman,^(b) nor an agent,^(c) has a general lien on chattels corporeal delivered to him as such.

- (a) *Rushforth v. Hadfield* (1805), 6 East, 519.
Wright v. Snell (1822), 5 B. & Ald. 350.

A railway company has a general lien for tolls under the Railways Clauses Consolidation Act, 1845, s. 97.

- (b) *Leuckhart v. Cooper* (1836), 3 Bing. (N.C.) 99.

In *Hill & Sons v. London Central Markets Cold Storage Co., Ltd.* (1910), 102 L.T. 715, it seems to have been admitted, on grounds not stated, that the defendants, warehousemen, had a general lien on the goods stored with them. But this may have been by virtue of special custom or agreement. See also *Fowitt & Sons v. Union Cold Storage Co.*, [1913] 3 K.B. 1.

- (c) *Bock v. Gorrisen*, *ubi supra*, at p. 443, *per Lord CAMPBELL, C.*

*Particular
lien*

1529. A particular lien arises by operation of law, for the reasonable charges of the creditor, when he has expended labour and skill, at the request of the debtor,^(a) upon the improvement of chattels bailed to him.^(b) *Semble*: such lien will only prevail against the interest of the person requesting the expenditure of the labour and skill.^(c) There is no lien for voluntary services.^(d)

- (a) *Oppenheim v. Russell* (1802), 3 Bos. & P. 42, at p. 47, *per ALVANLEY, C.J.*

Chase v. Westmore (1816), 5 M. & S. 180.

Franklin v. Hosier (1821), 4 B. & Ald. 341.

Scarfe v. Morgan (1838), 4 M. & W. 270.

- (b) It is essential that the creditor should have a possession which cannot be interrupted at the will of the debtor (*Forth v. Simpson* (1849), 13 Q.B. 680). Thus, the agister of cattle (*Chapman v. Allen* (1632), Cro. Car. 271; *Jackson v. Cummins* (1839), 5 M. & W. 342) and the livery stable keeper (*Judson v. Etheridge* (1833), 1 Cr. & M. 743) have no lien for their charges as such; though the reason is sometimes alleged to be that they do not render services which improve the value of the chattels. (*Hatton v. Car Maintenance Co., Ltd.*, [1915] 1 Ch. 621). And the lien cannot be claimed by a person who had merely paid the workman. Thus, the captain of a ship who pays for repairs done in England has no lien on the ship for his outlay (*Wilkins v. Carmichael* (1779), 1 Doug. (K.B.) 101).

The authorities extend to giving a marine insurance broker a lien on the policies effected by him, to the extent of premiums which he has paid (*Fisher v. Smith* (1878), 4 App. Cas. 1).

- (c) *Buxton v. Baughan* (1834), 6 C. & P. 674.

Pennington v. Reliance Motor Works, Ltd., [1923] 1 K.B. 127.

There may be an exception where the creditor was compellable to receive the goods, e.g. a common carrier (*Exeter Carriers Case* quoted by Holt, C.J., in *Yorke v. Grenaugh* (1703), 2 Ld. Raym. at p. 867), or an innkeeper (*Robins & Co. v. Gray*, [1895] 2 Q.B. 501). As a general rule a lien cannot be created against a person without his express or implied authority (*Cassils & Co. and Sassoon & Co. v. Holden Wood Bleaching Co., Ltd.* (1914), 84 L.J.(K.B.) 834; *Pennington v. Reliance Motor Works, Ltd.*, *ubi supra*); and such implied authority arises where the lien originates in a reasonable user of the chattel by a bailee (*Singer Mfging. Co. v. L. & S. W. Rly. Co.*, [1894] 1 Q.B. 833) or where the bailee undertakes to keep the chattel in repair and delivers it for repair (*Keene v. Thomas*, [1905] 1 K.B. 136; *Green v. All Motors, Ltd.*, [1917] 1 K.B. 625). A contractual limitation of authority imposed by the bailor on the bailee and not communicated to the repairer does not limit the implied authority of the bailee derived from the bailee being allowed to possess and use the chattel. (*Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K.B. 307); *aliter*, if the bailment has been determined before the delivery for repair (*Bowmaker, Ltd. v. Wycombe Motors, Ltd.*, [1946] K.B. 505).

- (d) *Nicholson v. Chapman* (1793), 2 Hy. Bl. 254.

The seller of goods has, in respect of the unpaid purchase-money, the lien specified in §§ 354-356 *ante*.

1530. The fact that the chattels were delivered to or acquired by the creditor under an express contract *Express contract not inconsistent*

with regard to remuneration, does not prevent the acquisition of a lien by operation of law if the contract contains nothing inconsistent with such lien.

Chase v. Westmore, ubi supra.

Scarfe v. Morgan, ubi supra.

Fisher v. Smith (1878), 4 App. Cas. 1.

*Lien by
agreement*

1531. Where the lien arises by agreement, the rights of the creditor are limited to the interest belonging to or capable of being disposed of by the debtor at the time when the liability was incurred, or subsequently acquired or disposable of by the debtor during the continuance of the liability.^(a) But the lien, to the extent to which it was valid against the debtor, is valid against all persons claiming through him, including his trustee in bankruptcy.^(b)

(a) *Wright v. Snell* (1822), 5 B. & Ald. 350.

Buxton v. Baughan (1834), 6 C. & P. 674, *per* ALDERSON, B.

Barry v. Longmore (1840), 12 Ad. & El. 639.

Re Sillence, Ex parte Roy (1877), 7 Ch. D. 70.

(b) *Lempriere v. Pasley* (1788), 2 Term Rep. 485.

Gurnell v. Gardner (1863), 4 Giff. 626.

Jewitt & Sons v. Union Cold Storage Co., [1913] 3 K.B. 1.

*Unlawful
possession*

1532. A person cannot by unlawfully taking possession of chattels acquire a lien upon them.

Lempriere v. Pasley, ubi supra, at p. 490, *per* ASHURST, J.

This was a case in which the person claiming the lien had paid freight on goods of which he unlawfully obtained delivery. *Semble*: the rule would be the same if the claim arose in respect of labour expended after obtaining unlawful possession (*Madden v. Kempster* (1807), 1 Camp. 12).

*No power of
sale*

1533. Generally speaking, the person entitled to the benefit of a lien has no power of sale of the chattels.

Thames Iron Works Co. v. Patent Derrick Co. (1860), 1 John. & H. 93.

But, by statute—

(i) an innkeeper may sell chattels which have been brought on to his premises by a guest,

in manner, and subject to the conditions specified in § 521 *ante*;

- (ii) a railway company may, after demand, sell, to satisfy tolls due to it for the use of the railway by the owner of such chattels, any chattels in respect of which such tolls are due, or any other chattels within the premises of the company belonging to the same owner ;

Railways Clauses Consolidation Act, 1845, s. 97.

- (iii) an unpaid seller of goods has the right to resell the goods under the conditions specified in § 361 *ante*.

1534. A creditor who detains chattels for the purpose of enforcing his lien for skill and labour, is not, in the absence of special contract, express or implied, entitled to add to his lien a charge for safe keeping of such chattels. *No charge for safe custody*

Somes v. British Empire Shipping Co. (1860), 8 H.L.Cas. 338.

1535. The liabilities of the creditor with regard to the safe custody of the chattels upon which he claims a lien depend upon the nature of the contract under which they are in his possession. *Liabilities of lienor*

Angus v. McLachlan (1883), 23 Ch. D. 330.

For particulars of these various contracts see *ante* §§ 385-407, 514-548.

1536. A lien is extinguished by (i) waiver of the lien,^(a) (ii) payment or tender, by the owner of the chattels or person entitled to the possession of them, of the amount due under the lien,^(b) (iii) conversion of the chattels to the creditor's use,^(c) (iv) voluntary parting with possession of the chattels.^(d) *Extinction of lien*

(a) *Morley v. Hay* (1828), 7 L.J.(O.S.) (K.B.) 104.

Weeks v. Goode (1859), 6 C.B. (N.S.) 367.

(b) *Jones v. Tartelet* (1842), 9 M. & W. 675.

- (c) *Jacobs v. Lascar* (1828), 5 Bing. 130. (In this case the creditor procured the chattels to be taken in execution on a judgment recovered by himself against the debtor. His conduct might, perhaps, also be treated as a case of waiver.)
Jones v. Tarleton, *ubi supra*.
Kerford v. Mondel (1859), 28 L.J. (Ex.) 303.
 (d) *Sweet v. Pym* (1800), 1 East, 4.
Hill & Sons v. London Central Markets Cold Storage Co., Ltd. (1910), 102 L.T. 715.

A mere demand of a larger amount than is due to the creditor does not destroy the lien (*Scarfe v. Morgan* (1838), 4 M. & W. 270). But a refusal to give up unless the whole of an excessive demand is paid is a conversion, and does (*Jones v. Tarleton* (1842), 9 M. & W., 675). Though the lien is generally lost by a voluntary parting with possession, it is not lost by placing them in the hands of a third party for safe custody (*Levy v. Barnard* (1818), 8 Taunt. 149) nor by their re-delivery to the owner for a specific purpose (*Albermarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K.B. 307).

*Evidence of
waiver*

1537. The taking of other security for the creditor's claim,^(a) or the giving of credit for the claim,^(b) if inconsistent with the continuance of the lien, is evidence of waiver of the lien.

- (a) *Coxwell v. Simpson* (1809), 16 Ves. 275.
Hezeison v. Guthrie (1836), 2 Bing. (N.C.) 755.

It was held, by KAY, J., in *Angus v. McLachlan* (1883), 23 Ch. D. 330, that the rule only applied where the taking of new security was inconsistent with retaining the lien; in other words, was an implied waiver. And this view seems to have been followed in *Re Morris*, [1908] 1 K.B. 473.

- (b) *Raitt v. Mitchell* (1815), 4 Camp., 146, at pp. 149-150.

SECTION XI

INVOLUNTARY ALIENATION OF CHATTELS CORPOREAL

1538. Upon an adjudication in bankruptcy there *Bankruptcy* passes to the trustee in bankruptcy the ownership of^(a) —

(i) all such chattels corporeal as were the property of the bankrupt at the commencement of the bankruptcy ;^(b)

— (ii) all such chattels corporeal as, at the commencement of the bankruptcy, were in the possession, order, or disposition of the bankrupt, in his trade or business, with the consent of the true owner, under such circumstances that the bankrupt was the reputed owner thereof.^(c)

And such ownership passes from trustee to trustee (including the official receiver when acting as trustee) on appointment, without any express conveyance.^(d)

(a) Bankruptcy Act, 1914, s. 18 (1).

(b) *Ibid.* s. 37 (i). (For the meaning of this expression see *ante*, § 1429.)

(c) *Ibid.* s. 38 (1) (a).

(d) *Ibid.* s. 53.

From the operation of the rule in the text must be excepted
(1) property held by the bankrupt on trust for any other person,
(2) tools of his trade and wearing apparel, together not exceeding £20 in value (s. 38 (1) (2)).

1539. Subject to § 1540, the ownership of chattels *Subsequently acquired chattels* corporeal acquired by, or devolving on, the bankrupt before his discharge, also passes to the successive trustees in his bankruptcy, in like manner.

Bankruptcy Act, 1914, s. 38 (a).

Subject, of course, to the same exception of chattels held in trust by the bankrupt for other persons (*ibid.*).

Disclaimer

1540. A trustee in bankruptcy may disclaim, in manner and subject to the conditions specified in §§ 1430-1432 *ante*, any chattels corporeal forming part of the (former) property of the bankrupt, which are unsaleable, or not readily saleable, by reason of their binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money ; and such disclaimer will operate in manner expressed in §§ 1432 and 1433 *ante*.

Bankruptcy Act, 1914, s. 54 (1).

Examples of chattels corporeal disclaimable on the above grounds would be (1) goods to which a liability for freight attached, (2) goods pledged for more than their value. But there do not appear to be any decisions with regard to chattels corporeal ; though there are many with regard to leases and things in action.

Execution

1541. Subject to certain exceptions,^(a) any of the chattels corporeal of a judgment debtor, wherever situate within the jurisdiction,^(b) may be seized by the sheriff under a writ of Fi. Fa. or a County Court bailiff, to satisfy a judgment or order of the Court for payment of money.^(c) But the property in the chattels is not divested from the debtor until a proper sale has been effected by the sheriff or bailiff.^(d)

(a) The most important exceptions are (1) the wearing apparel and bedding of the debtor or his family, and his tools or implements of trade, up to the value of five pounds (Small Debts Act, 1845, s. 8 ; County Courts Act, 1934, s. 121), and (2) the rolling stock of a railway company (Railway Companies Act, 1867, s. 4).

(b) If goods have been removed to the house of a third person to evade execution, the sheriff may even (after request to open) break into such house to seize the goods. Otherwise the sheriff may not break into a house at the suit of a private person (*Semayne's Case* (1604), 5 Co. Rep. 91 a). If the sheriff enters the house of a stranger on mere suspicion that the debtor's goods are there, he acts at his own risk. But he is justified in entering any house where the debtor's goods might reasonably be expected to be (e.g. that of the debtor's executor), whether in fact the goods are there or not (*Cooke v. Birt* (1814), 5 Taunt. 765).

(c) Judgments Act, 1838, s. 12. (This enactment extended the sheriff's powers to money, bank-notes, and negotiable instruments, which were not seizable at the common law under a Fi. Fa.)

County Courts Act, 1934, ss. 116-134.

(d) *Giles v. Grover* (1832), 9 Bing. 128.

The writ of Fi. Fa. now only binds the debtor's chattels from the time at which it is lodged with the sheriff or bailiff for execution; and a *bonâ fide* acquirer for value of the chattels, after the lodging of the writ, but before actual seizure, is protected if he had no notice of the lodging of the writ (Sale of Goods Act, 1893, s. 26). Generally speaking, chattels in the hands of the sheriff or bailiff under a writ of execution cannot be distrained for rent (*Wharton v. Naylor* (1848), 12 Q.B. 673, at p. 677, *per* PATTERSON, J.); though there is an exception for growing crops if there is no other sufficient distress (Landlord and Tenant Act, 1851, s. 2). And an execution creditor is not entitled to the benefit of his execution, if he has notice of an act of bankruptcy committed by the debtor before completion of the execution by seizure and sale (Bankruptcy Act, 1914, s. 40). An ingenious evasion of similar provisions in earlier bankruptcy legislation has been stopped by the section abolishing the application of the writ of *Elegit* (*ante*, § 1434, n.) to goods (Bankruptcy Act, 1883, s. 146, which is not repealed by the Act of 1914). The Crown has prerogative remedies against the goods of its debtors and their debtors, without proceeding to judgment, similar to those which it enjoys against the lands of such persons (*ante*, § 1434, n., and *Pridgeon v. Mellor* (1912), 28 T.L.R. 261).

1542. *Primâ facie*, but subject to various exemptions,^(a) the landlord of any premises may seize and sell, under a distress for rent,^(b) any chattels corporeal found upon the premises; whether they are the property of the tenant, or not.^(c) But the property in the chattels is not divested, until a proper sale to a stranger has been effected by or on behalf of the distrainer.^(d)

- (a) The number of exemptions from distress is considerable; and the subject is too complicated to be described in detail. Briefly, the absolute exemptions are (i) animals *ferae naturae* (Co. Litt. 47 a), (ii) chattels in actual use (*Simpson v. Harriopp* (1744), Willes, 512), (iii) chattels delivered by the owner to be dealt with by the occupier of the premises in the way of his public trade (*ibid.*), (iv) chattels in the custody of the law, e.g. already seized under an execution or distress (*Wharton v. Naylor* (1848), 12 Q.B. at p. 677, *per* PATTERSON, J.)—but the landlord can insist on arrears of rent not exceeding one year being paid before the chattels are removed under an execution (Landlord and Tenant Act, 1709, s. 1; but this exception is limited to executions on judgments *inter partes*, and a levy for rates is not included (*Potts v. Hickman*,

[1941] A.C. 212); (v) perishable goods (*Morley v. Pincombe* (1848), 2 Exch. 101), (vi) loose money (because it cannot be identified), (vii) fixtures (*Darby v. Harris* (1841), 1 Q.B. 895; *Crossley Bros., Ltd. v. Lee*, [1908] 1 K.B. 86), (viii) chattels of the Crown on land occupied by a subject (*Sec. of State for War v. Wynne*, [1905] 2 K.B. 845), (ix) machinery of a stranger lent under an agreement to the tenant of an agricultural holding for purposes of his business, and live stock of a stranger on such holding solely for breeding purposes (Agricultural Holdings Act, 1923), (x) wearing apparel and bedding protected from seizure in execution by County Courts Act, 1934, s. 121 (*ante*, § 1541, n. (a); Law of Distress Amendment Act, 1888, s. 4), (xi) chattels of an under-tenant, lodger, or stranger having no interest in the premises, who conforms to the requirements of the Law of Distress Amendment Act, 1908 (ss. 1, 2). This last exemption seems practically to abolish the common law rule which made a stranger's goods liable to seizure under a distress for rent by the landlord of the premises where they might happen to be. Certain other classes of chattels are privileged *sub modo*—i.e. if there is other sufficient distress on the premises. On the other hand, the goods of a lessee fraudulently removed by him for the purpose of avoiding distress, may be seized by the landlord within thirty days, if in the meantime they have not been sold to a *bonâ fide* purchaser for value (Distress for Rent Act, 1737, ss. 1, 2).

- (b) The power of sale did not exist at the common law; but was conferred by the Distress Act, 1689. The right of sale is subject to many rules and restrictions (see especially Law of Distress Amendment Act, 1888).
- (c) At common law, the power to distrain belonged only to a reversioner, in respect of services. But, by the Landlord and Tenant Act, 1730, s. 5, it was extended to owners of rents seck, rents of assize, and chief rents, and by the Law of Property Act, 1925, s. 121 (2), to the owners of all annual sums charged on land which are twenty-one days in arrear. But this last remedy is only given "as far as it might have been conferred by the instrument under which the annual sum arises", but no further. And although it is provided by s. 141 (2) Law of Property Act, 1925, that any such rent may be recovered or enforced by the person entitled to the whole or part of the income of the land leased, it has been held that a *cestui que trust* cannot distrain where his trustee is the landlord (*Schalit v. Joseph Nadler, Ltd.*, [1933] 2 K.B. 79).
- (d) *King v. England* (1864), 4 B. & S. 782.
Moore, Nettleford & Co. v. Singer Manufacturing Co., [1904] 1 K.B. 820.
Plascoed Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd., [1912] 2 K.B. 345.

PART III

CHOSSES (THINGS) IN ACTION

SECTION XII

NATURE AND DEFINITION OF CHOSSES (OR THINGS) IN ACTION

TITLE I—GENERAL

1543. For the purposes of this and the next following Section, the term “chose (or thing) in action”, unless otherwise specified, includes all kinds of incorporeal personal property, other than (i) rights immediately connected with land, (ii) rights to sue for unliquidated damages, (iii) rights arising by virtue of trusts, (iv) rights to benefits in the estates of deceased persons, and (v) negotiable instruments. “Chose in action”

The vagueness of the phrase “chose in action” in English law has been previously noticed (§ 481, n.); and it would be difficult to frame an exact definition of a conception the scope of which enlarges from year to year at the bidding of practical requirements. Probably the term came into use as a convenient expression to cover all forms of property which were incapable of inclusion in the medieval contrast between land and chattels; and it is in this sense that it is here adopted as a third division of this Book. But, unfortunately, the Courts have on some occasions applied it to rights, e.g. of presentation to a vacant ecclesiastical benefice (*Brooksbie's Case* (1590), Cro. Eliz. 174) and rights to relief against forfeiture of leases (*Howard v. Fanshawe*, [1895] 2 Ch. 581), which are more appropriately now regarded as interests in land, and have, accordingly, been so treated in this work. The nature and incidents of the right to sue for damages for breach of contract or quasi-contract, or for the commission of a tort, have also been dealt with under the Law of Obligations (*ante*, Book II, Parts I and II). There is a very close resemblance between things in action and the rights of beneficiaries under a trust, a testament, or an intestacy; but, for historical reasons, such rights were not usually regarded by the Common Law Courts as actionable, and were

enforced in other tribunals. Hence they will be more conveniently treated under the special heads of Trusts and Succession (*post*, Section XVII and Book V). Negotiable instruments, being governed by the Law Merchant as adopted and modified by the Bills of Exchange Acts, 1882 and 1906, do not form part of the subject-matter of this work.

*Rules affect-
ing choses in
action*

1544. Generally speaking, and subject to §§ 1479-1485 *ante*, the rules affecting the ownership of chattels corporeal, the acquisition of chattels corporeal absolutely or by way of security (*ante*, Section X), and the incapacity to hold or alienate chattels corporeal, are applicable equally to things in action as defined in § 1543.

But—

- (i) the provisions of the Sale of Goods Act, 1893, including the doctrine of sale in market overt (*ante*, § 336) have no application to things in action ;

Sale of Goods Act, 1893, s. 62.

On the other hand, the provisions of the Bills of Sale Acts now apply to general assignments of book debts, which are, of course, things in action (Bankruptcy Act, 1914, s. 43).

- (ii) notwithstanding the general rule of Equity on the subject of mortgages (*ante*, § 1367), debentures issued by a company incorporated under the Companies Act, 1929, may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or at the expiration of a period, however long ;

Companies Act, 1929, s. 74.

Knightsbridge Estates Trust, Ltd. v. Byrne, [1940] A.C. 613.

- (iii) a minor who acquires things in action may repudiate them before or within a reasonable time after attaining his majority ;^(a) and (*semble*) a minor cannot, except by virtue of statute, make a binding alienation of a chose in action.^(b)

- (a) *Newry v. Enniskillen Rly. Co. v. Goombe* (1849), 3 Exch. 565.
Re Imperial Mercantile Credit Association, Curtis' Case (1868),
 L.R. 6 Eq. 455.
Re China Steamship and Labuan Coal Co., Capper's Case (1868),
 3 Ch. App. 458.

Mann's Case (1867), 3 Ch. App. 459, n.), which, apparently, treated the transfer to the infant as a mere nullity, would appear to have been wrongly decided. An infant may even be sued for calls on shares held by him (*North Western Railway Co. v. M Michael* (1851), 5 Exch. 114).

- (b) Practically the only modern authority on the capacity for alienation by a minor, viz. the case of *Taylor v. Johnston* (1882), 19 Ch. D. 603 (*ante*, § 146) dealt only with gifts of chattels corporeal, including bank-notes; and the Court limited its decision to alienation by delivery, a method of alienation not applicable (or only applicable to a very limited extent) to things in action.

1545. There can be no possession of a thing in action. But—

“Possession”
of choses in
action

- (i) debts due or growing due to a bankrupt in the course of his trade or business will be deemed to be in his “order and disposition” for the purposes of the Bankruptcy Act, until notice of a transfer has been received by the respective debtors, or the true owner has taken every possible step to “obtain possession of the debt”;

Bankruptcy Act, 1914, ss. 38 (c), 42.

Colonial Bank v. Whinney (1886), 11 App. Cas. 426.

Rutter v. Everett, [1895] 2 Ch. 872.

- (ii) the delivery of documents of title to things in action, by way of security for the payment of money, will entitle the person to whom or on whose behalf such delivery is made to a charge in equity upon such things in action, and a lien upon such documents of title;

Colonial Bank v. Whinney, *ubi supra* at p. 433, *per* Lord BLACKBURN.

For the nature and effects of an equitable charge see *ante*, §§ 1398, 1400; of a lien, *ante*, §§ 1525–1527.

- (iii) a deposit of a bill of lading by way of security will have the effect described in § 1515 *ante* ; but it will not transfer the right to sue or the liability to be sued on the contract with the ship-owner, unless it was the intention of the parties that the property in the goods should pass to the creditor ;

Bills of Lading Act, 1855, s. 1.

Sewell v. Burdick (1884), 10 App. Cas. 74.

- (iv) where a seller or purchaser of goods in possession of the documents of title to the goods delivers the documents to a ~~person who~~, under any sale, pledge, or other disposition thereof, receives the same in good faith and without notice of any lien or other right of the original purchaser or seller (as the case may be) of the goods, such delivery or transfer will have the same effect as though it were made by a mercantile agent in possession of such documents with the consent of the owner ; but in the case of a purchaser, only when he has obtained such documents with the consent of the seller.

Factors Act, 1889, ss. 8, 9. (See *ante*, §§ 338, 339.)

- (v) a *donatio mortis causâ* of things in action may be validly effected by a delivery to the intended donee of a document which, in the opinion of the Court, forms the indicia of title to property.

Duffield v. Elwes (1827), 1 Bli. (N.S.) 497 (mortgage deeds).

Moore v. Darton (1851), 4 De G. & Sm. 517 (receipt containing terms).

Veal v. Veal (1859), 27 Beav. 303 (Promissory notes payable to the donor).

Re Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76 (banker's deposit notes).

Re Weston, Bartholomew v. Menzies, [1902] 1 Ch. 680 (Post Office Savings Bank Book).

The principles upon which the Court proceeds in arriving at this conclusion are far from clear and the cases by no means easy

to reconcile. But it seems that to be effectual, the document must be such as to confer on the donee a control over the chose in action analogous to the control enjoyed by the possessor of a chose in possession (cf : *Delgoffe v. Fader*, [1939] Ch. 922 ; and *Re Dillon, ubi supra*). Thus, for example, the handing over of a mere receipt for money will not be a good *donatio mortis causa* (*Re Davis, Griffith v. Davis* (1902), 86 L.T. 889) ; nor will the delivery of certificates of railway stock (*semble*, not being to bearer) (*Moore v. Moore* (1874), L.R. 18 Eq. 474). And the delivery of title-deeds does not pass any interest in the land (*Duffield v. Elwes, ubi supra*, at p. 539, *per* Lord ELDON, following Lord HARDWICKE). According to the ordinary rule of delivery (*ante*, § 1471), a thing in action of which the documents of title are already in the possession of the intended donee, may be made the property of the donee by mere oral direction (*Cain v. Moon*, [1896] 2 Q.B. 283). See further on *donationes mortis causa*, *post*, §§ 2027, 2032, 2033.

TITLE II—DEBTS

Definition of debt

1546. A debt is a definite sum of money recoverable from one person (the “debtor”) by another person (the “creditor”) by means of a common law action ; whether payment can be claimed immediately or not.

Re Charles (1811), 14 East, 197.

West Ham Union v. St. Matthew, Bethnal Green (Churchwardens, etc.), [1896] A.C. 477.

Re Mitchell, Freelove v. Mitchell, [1913] 1 Ch. at p. 206, *per* PARKER, J.

Historically, the “specific” character of a claim in debt has been of great importance ; and, though the long prevalent distinction between the quasi-proprietary action of Debt and the purely personal action of Assumpsit has disappeared with changes in legal procedure, its effects have by no means disappeared. Thus, while it may be said, broadly, that claims to unliquidated damages can only arise out of contract or tort, “debts” may arise also from tenure, statute, bond (which originally was not regarded as a contract), judgment, a call on shareholders, a failure to perform public liabilities, and other sources. And, even now, the distinction between a debt and an unliquidated claim under a contract may be practically important ; e.g. a right to the performance of a contract for personal services is not assignable, but a right to a definite sum of money due under such a contract is (*Crouch v. Martin and Harris* (1707), 2 Vern. 595 ; *Russell & Co., Ltd. v. Austin Fryers* (1909), 25 T.L.R. 414).

Debt of record

1547. A “debt of record” is a debt which is payable by virtue of a recognizance^(a) entered into with the Crown or a person acting on behalf of the Crown, or by virtue of a judgment or other order of an English court of record. Such debts can be enforced in a summary manner by execution or other process of the court.^(b) In the case of a judgment debt due to a private person, execution cannot be issued without the leave of the court after six years from the date of the judgment ;^(c) and, after twelve years, the judgment can no longer be enforced, by

action or otherwise, unless in the meantime a written acknowledgment or part payment of the debt has been given or made by the debtor or his agent, to the creditor or his agent.^(a)

- (a) "A recognizance is an obligation of record, which a man enters into before some Court of record, or a magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt or the like" (2 Bl. Comm. 341). The debt may be expressed to be due to the Crown, to an officer of the Court or to the plaintiff in the action.
- (b) Of course, the existence of summary remedies does not prevent the creditor resorting to an action if he pleases; except in the case of County Court judgments, upon which no action can be brought (*ante*, § 698). The normal remedy for breach of a recognizance is for it to be estreated, and an action upon it is rare. Actions to enforce a recognizance must be brought within six years of the breach (Limitation Act, 1939, s. 2 (1) (b); this Act binds the Crown (*ibid.* s. 30), except as to actions for the recovery of any duties or taxes or forfeiture proceedings connected therewith (*ibid.* s. 30 (1), (2), (3), (4)).
- (c) R.S.C., O. XLII, rr. 22, 23 (a).
- (d) Limitation Act, 1939, s. 2 (4), 23 (4), 24. And no arrears of interest on a judgment debt shall be recoverable after six years from the date on which the interest became due (*ibid.* s. 2 (4)). Once an action upon a judgment is barred, no execution can be issued upon it (*Hebblethwaite v. Peover*, [1892] 1 Q.B. 124; *Jay v. Johnstone*, [1893] 1 Q.B. 189).

1548. A "specialty debt" is a debt which is payable by virtue of a deed or other sealed document.^(a) Generally speaking, such a debt can be sued for at any time within twelve years after the cause of action accrued,^(b) or within twelve years from the last acknowledgment in writing or part payment of the debt by the party liable or his agent, to the creditor or his agent.^(c)

Specialty debt

- (a) *Re Artizans' Land and Mortgage Corporation*, [1904] 1 Ch. 796.
- (b) Limitation Act, 1939, s. 2 (3) "provided that this sub-section shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act", e.g. an action for recovering arrears of rent (six years, *ibid.* s. 17). This section avoids the conflict which existed hitherto between the period applicable to a specialty and that relating to principal sums charged on property.
- (c) *Ibid.* ss. 24, 25.

Bond debt

1549. A "bond debt" is a debt due by virtue of a sealed acknowledgment by the debtor ("obligor") of his liability to pay to the creditor ("obligee") a certain sum of money.^(a) Where to such acknowledgment is annexed a condition that the bond shall be void on payment of a smaller sum of money and interest, the bond is said to be a "money bond"; and, on breach of the condition, the sum payable under such condition, with interest and costs, but no more, may be recovered in an action on the bond.^(b) Where the condition of the bond is the performance of any covenants or agreements in any indenture, deed, or writing, the obligee, in an action on the bond, must assign breaches, and can only recover such sums as the jury assign in respect thereof, and costs.^(c) But where the condition of the bond is the performance or non-performance of some other act, then the obligee, on breach of the condition, may recover the full amount of the sum for which the bond was given.^(d)

(a) *Morant v. Gough* (1827), 7 B. & C. 206. (This case shows that the bond need not take the form of a condition with a penalty.)

(b) 4 & 5 Anne (1705), c. 3, s. 13.

England v. Watson (1842), 9 M. & W. 333.

(c) 8 & 9 Will. III (1696), c. 11, s. 8. (Presumably when the case is tried without a jury, the finding of the Court would be equivalent.)

Judgment may, however, be recorded for the full amount of the penalty, and, in the event of further breaches, execution for further sums may be issued by leave of the Court (*ibid.*). An action on a bond shall not be brought after the expiration of twelve years from the date on which the cause of action accrued (Limitation Act, 1939, s. 2 (3)).

(d) *Strickland v. Williams*, [1899] 1 Q.B. 382.

This decision does not, apparently, interfere with the general principle by which Equity will relieve against penalties (§§ 114, 279). Subject to this reservation, a bond made after 1881 binds the real as well as the personal estate of the obligor (Law of Property Act, 1925, s. 80 (1)).

Simple contract debts

1550. An action founded on simple contract must be brought within six years from the date on

which the cause of action accrued ^(a) or after a written acknowledgment or part payment by the party liable (or his agent) made to the party (or his agent) whose claim is being acknowledged or in respect of whose claim the payment is being made.^(b)

(a) Limitation Act, 1939, s. 2 (1).

(b) *Ibid.* s. 23 (4), 24.

The Limitation Act, 1939, came into force on 1 July, 1940, and amended and consolidated the law relating to the limitation of actions. The result is to produce greater uniformity and to remove anomalies. With a few exceptions (see ss. 1 (4), 2 (5), 4 and 21) the Act prescribes only two periods of limitation, viz. : twelve years and six years. The six-year period applicable to actions to enforce simple contract debts also applies to actions,

- (i) to enforce a recognizance (*ante*, § 1547) ;
- (ii) to enforce an award where the submission is not by a document under seal (*ibid.* s. 2 (1), (3)) ;
- (iii) to recover any sum in virtue of an enactment, other than a penalty (*ibid.*, s. 2 (1), (5)) ;
- (iv) for an account (*ibid.*, s. 2 (2)).

1551. Sums certain due under foreign judgments *Foreign judgments* may be recovered as debts in English courts, subject to the provisions set out in § 697 *ante* ; but such debts are only simple contract debts.

Dupleix v. De Rozen (1705), 2 Vern. 540.

Wilson v. Dunsany (Lady) (1854), 18 Beav. 293.

Since a foreign judgment ranks as a simple contract debt, an action on it in the English courts is barred after six years : an action on an English judgment is barred after twelve years (*ante* § 1547).

1552. An action of debt, or information, by a common informer for a penalty, is barred by the pendency of a *bonâ fide* action, or information, previously commenced by another person, against the same defendant, for the same offence ; even though the earlier action has not been brought to trial. *Actions by common informers*

Chalchman v. Wright (1606), Noy, 118.

Girdlestone v. Brighton Aquarium Co. (1878), 3 Ex. D. 137.

Forbes v. Samuel, [1913] 3 K.B. 706.

The later action is not abated (*Baines v. Blackbourne* (1755),

Say. 216 ; *Combe v. Pitt* (1763), 3 Burr. 1423). And so, presumably, if the earlier action is withdrawn or defeated, the later may be proceeded with. An action to recover any penalty or forfeiture recoverable by virtue of any enactment is barred after the expiration of two years (Limitation Act, 1939, s. 2 (5) : See also *ibid.*, s. 30 (1), 32).

Interest

1553. In any proceedings, tried in a court of record for the recovery of any debt, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1).

The section does not apply to any debt upon which interest is payable as of right, or to damages for dishonour of a bill of exchange (*ibid.*).

TITLE III—ANNUITIES AND PENSIONS

1554. An annuity or pension is a certain yearly sum^(a) (whether payable by instalments or not,^(b) and whether liable to increase, reduction, or cesser, on the happening of a condition, or not^(c)) payable to a definite person or persons ("annuitants") for a wholly uncertain period,^(d) or for a term of years or life, or in perpetuity.^(e) Even when an annuity is charged on land,^(f) or when it is granted to a man and his heirs,^(g) it is personal estate. *Definition*

- (a) The essence of an annuity is, that it is in the nature of income only. A bond may be given to secure the payment of an annuity; but if a principal sum is secured, the income is not an annuity (*Winter v. Mouseley* (1819), 2 B. & Ald. 802). There does not seem to be any difference in principle between an "annuity" and a "pension"; but the latter term is usually confined to annuities given as a reward for past services, real or imaginary. (See remarks of JOYCE, J., in *Knill v. Dumergue*, [1911] 2 Ch. at p. 203.)
- (b) *Blackborn v. Edgley* (1719), 1 P. Wms. 600.
Re Dowse, Dowse v. Glass (1881), 50 L.J. (Ch.) 285.
- (c) *Martin v. Margham* (1844), 14 Sim. 230.
Arnott v. Tyrrell (1855), 21 Beav. 49.
Thompson v. Cartwright (1863), 33 Beav. 178.
Adams v. Adams, [1892] 1 Ch. 369.
Re Adamson, Public Trustee v. Billing (1913), 108 L.T. 179.

Of course if the condition is contrary to the policy of the law ante, §§ 194–195) it will be void (*Hunt-Foulston v. Furber* (1876), 3 Ch. D. 285).

- (d) *Turner v. Turner* (1783), 1 Bro. C.C. 316.
- (e) *A-G v. Christ's Hospital* (1831), 9 L.J. (O.S.) (Ch.) 186 (perpetuity).
Thompson v. Cartwright, ubi supra.
Blight v. Hartnoll (1881), 19 Ch. D. 294 } (life).
Re Morgan, Morgan v. Morgan, [1893] 3 Ch. 222 }
Re Drayton, Francis v. Drayton (1912), 56 Sol. Jo. 253 (*par autre vie*).

The presumption, in the absence of special circumstances, is that an annuity is for the life of the annuitant; and, even in a testament, a gift of an annuity to the legatee, simply, will only create a life interest (*Blight v. Hartnoll, ubi supra*, at p. 296, *per* FRY, J.; approved in *Re Morgan, ubi supra*, at p. 229, *per* LINDLEY, L.J.; but see *Reid v. Coggans (or Reid)*, [1944] A.C. 91.)

- (f) *Taylor v. Martindale* (1841), 12 Sim. 158.
Re Baxter's Trusts, Malling v. Addison (1911), 104 L.T. 710.

No life annuity granted since 25th April 1855, otherwise than by will or marriage settlement, has any effect on land, as against purchasers, mortgagees, and creditors, until a memorandum of it has been registered under the Judgments Act, 1855. It is a question of construction whether a gift of an interest called an "annuity" may not be in fact a "rent charge" if the sum is charged on land (*Re Feather, Harrison v. Tapsell*, [1945] Ch. 343). It seems somewhat difficult to distinguish between a rent charge and an annuity charged on land, now that (*semble*) the owner of such an annuity can distrain under the provisions of the Law of Property Act, 1925, s. 121 (a). And yet a rent charge is real estate (*ante*, §§ 1212-1220), while an annuity, even though charged on land, is, *semble*, personalty. Probably the point would be settled by the language of the grant (*Re Baxter's Trusts, ubi supra*).

- (g) *Stafford (Earl) v. Buckley* (1750), 2 Ves. Sen. 170.
Radburn v. Ferois, Hare v. Hill (1841), 3 Beav. 450.

*Annuities
charged on
land*

1555. An annuity charged on land will be void as against a creditor or a purchaser of any interest in the land charged, unless the annuity is for the time being registered in the register of annuities or in the register of land charges in the Land Registry.

Land Charges Act, 1925, ss. 5, 13.

On the other hand, registration is deemed to be actual notice to all persons for all purposes connected with the land as from the date of registration (Law of Property Act, 1925, s. 198 (1)).

*Personal
liability of
grantor*

1556. An annuity is created by deed of grant or by testament. It is a question of construction whether the creator undertakes any personal liability for the payment of the annuity.

Co. Litt. 114, b.

Cane v. Chapman (1836), 5 Ad. & El. 647.

Semble : if an annuity is granted without any reference to any fund out of which it is to be paid, the inference is irresistible, that the grantor binds himself personally to pay it.

*Remedies of
annuitant*

1557. In addition to his personal remedies (if any) against the creator of the annuity, an annuitant whose annuity was created since 1881, and is charged on land, has the remedies against the land described in § 1214 *ante*,^(a) and, where the annuity is charged

on land by way of legal mortgage, whatever the date of its creation, to the remedies described in § 1369. *ante.*^(b) Whether an annuity charged on land is enforceable against the *corpus* of the land, or only against the income,^(c) and whether, in the latter case, it can be raised out of future, or only out of current income,^(d) are questions of construction in each case. *Semble* : the terre-tenant of land is not, merely from the fact that an annuity is charged upon the land, personally liable for payment of the annuity.^(e)

(a) Law of Property Act, 1925, s. 121.

-- (b) Law of Property Act, 1925, s. 87.

(c) *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479.

It seems now to be regarded as settled that, even where the annuity is stated to be payable "out of income", or "rents and profits", yet, if there is a disposition of the property "subject to" the annuity, the *corpus* will be liable (*Re Howarth, Howarth v. Makinson*, [1909] 2 Ch. 19 (testament); *Re Watkins' Settlement, Wills v. Spence*, [1911] 1 Ch. 1 (deed). But see *Re Boulcott's Settlement, Wood v. Boulcott* (1911), 104 L.T. 205; *Re Griffiths, Haworth v. Welton*, [1945] 1 All. E.R. 610).

(d) *Booth v. Coulton* (1870), 5 Ch. App. 684.

Re Boden, Boden v. Boden, [1907] 1 Ch. 132.

(e) There does not seem to be any express authority for this proposition; but the absence of authority the other way is very strong. Even the writ of Annuity seems only to have lain against the grantor of the annuity (F.N.B. 121 H., I.). So it would appear that the line of reasoning upon which the Court of Queen's Bench, in *Thomas v. Sylvester* (1873), L.R. 8 Q.B. 368, arrived at the conclusion that a terre-tenant was personally liable for a rent charged on his land, would not apply to an annuity (*ante*, § 1213).

1558. Where a sum of money or other property is bequeathed for the purchase of an annuity,^(a) or where there is a direction in a testament to purchase an annuity for the benefit of a specified person,^(b) the annuitant or intended annuitant is entitled, in place of having the annuity purchased, to demand immediate payment of the sum bequeathed, or of the amount required to purchase the annuity, as the case may be. And even if the annuitant or intended

Option to realize

annuitant dies before any part of the annuity has become payable, such right passes to his personal representative ;^(c) though the annuity was an annuity for the life of the annuitant only.^(d)

(a) *Woodmeston v. Walker* (1831), 2 Russ. & M. 197.

Re Robbins, Robbins v. Legge, [1907] 2 Ch. 8.

(b) *Ford v. Batley* (1853), 17 Beav. 303.

Re Brunning, Gammon v. Dale, [1909] 1 Ch. 276.

(c) *Wakeham v. Merrick* (1867), 37 L.J. (Ch.) 45.

(d) *Barnes v. Rowley* (1797), 3 Ves. 305.

Bayley v. Bishop (1803), 9 Ves. 6.

A "restraint on anticipation" (*post*, §§ 1696-1700) will not prevent the operation of the rule in the text, if the annuitant is unmarried when she makes the demand (*Woodmeston v. Walker, ubi supra*). The right to demand payment of the capital does not, however, exist where the annuity is subject to forfeiture on alienation (*Hatton v. May* (1876), 3 Ch. D. 148) ; nor, it should seem, where the annuity is directly created by the testament (*Wright v. Callender* (1852), 2 De G.M. & G. 652), except where there is a deficiency of assets (*Re Ross*, [1900] 1 Ch. 162). In *Hill v. Rattey* (1862), 2 John. & H. 634, the bequest was probably treated as a bequest of capital.

Apportionment of liability

1559. When an annuity is charged upon two or more separate properties, such properties must, as between their respective owners, bear the burden of the annuity in proportion to the respective annual incomes of such properties from time to time, and not in proportion to their respective capital values.

Ley v. Ley (1868), L.R. 6 Eq. 174.

The charge in this case was probably a legal rent charge. But the principle would appear to be the same for annuities ; though it would seem to be difficult to work in practice. There appears to be no other decision on the point. Cf. with the case cited *Young v. Hassard* (1844), 1 Jo. & Lat. 466.

Limitation of time for recovery

1560. An annuity charged on land, or given by way of legacy, cannot be enforced after the lapse of twelve years from the time when a present right to receive the same accrued to a person capable of giving a discharge therefor, or from the giving of a written acknowledgment or part payment to the

person entitled to receive the same, or his agent, by the person by whom the same is payable, or his agent ;^(a) and no action of debt to recover an annuity created by specialty can be brought except within the same time limits (§ 1548 *ante*).^(b)

(a) Limitation Act, 1939, ss. 4 (3), 20.

(b) *Ibid.* s. 2 (3).

An action to recover land must be brought within twelve years from the date when the right of action accrued (*ibid.* s. 4 (3)). "Land" includes a "rentcharge", and "rentcharge" includes an annuity charged on land (*ibid.*, s. 31 (1)). Time begins to run from the date of the last payment (*ibid.* s. 31 (6)).

1561. Not more than six years' arrears of an annuity charged on land can be recovered ;^(a) but here is no limit (subject to § 1548) to the recovery of arrears of a purely personal annuity.^(b) *Recovery of arrears*

(a) Limitation Act, 1939, s. 17.

(b) *Re Ashwell's Will* (1859), John. 112.

Re Bannerman's Estate, Bannerman v. Young (1882), 21 Ch. D. 105.

The position since the Limitation Act, 1939, seems to be the same, for arrears of an annuity charged on personal property do not all within the definition of "rent" in s. 17, nor is the annuity a principal sum charged on property within s. 18 (1), nor are arrears of interest on such a sum within s. 18 (5).

1562. Annuities, not being annual sums made payable in policies of assurance,^(a) and not being payable in advance,^(b) are, in the absence of express stipulation, deemed to accrue from day to day ; but an apportioned part is only recoverable on or after the date when the next payment would in the ordinary course have become payable.^(c) *Apportionment of payment*

(a) Apportionment Act, 1870, s. 6.

(b) *Trevailon v. Anderson* (1897), 66 L.J. (Q.B.) 489.

(c) Apportionment Act, 1870, ss. 2, 3, 7.

To the fact that they were recoverable by action of Debt, we probably owe the common law rule, apparently so absurd, that rents, annuities, and other payments due at fixed and stated periods, were not apportionable, and that, consequently, if the title of any creditor expired between the dates of two payments, the current instalment

could not be recovered by the creditor or his representatives. This rule was first amended, in respect of rents, by the Distress for Rent Act, 1737, s. 15 (which provided only a partial remedy), and then by the Apportionment Act, 1834, which, however, at least so far as annuities are concerned, is prospective only. These provisions are still in force; but have been practically superseded (after various other efforts) by the Act of 1870, which is retrospective. The curious exception of annuities payable under policies of assurance, so carefully inserted in both the Acts of 1834 and 1870, does not seem very intelligible; and the books on Insurance Law are curiously silent on the point, though Porter (8th edn. p. 96) seems to assume that section 6 of the Act of 1870 applies exclusively to the payment of premiums.

*No action
for Crown
pension*

1563. Where a pension has been granted by the Crown, gratuitous or in respect of past services, no action will lie against any Crown official for payment of the pension; even though a special fund has been granted to such official by the Crown for the purpose.^(a) The same rule applies to moneys voted by Parliament for the reward of public services.^(b)

(a) *Gidley v. Palmerston (Lord)* (1822), 3 Brod. & Bing. 275.

Kinloch v. Sec. of State for India (1882), 7 App. Cas. 619.

(b) *Grenville-Murray v. Clarendon (Earl)* (1869), L.R. 9 Eq. 11.

A fortiori no action will lie against a Crown official for payment of a pension which has not been actually granted (*Edmunds v. A.-G.* (1878), 47 L.J. (Ch.) 345).

*Alienation
of pensions*

1564. Generally speaking, the salary or emoluments of a public office under the Crown, paid out of national funds, are not assignable by the holder, or liable to the payment of his debts.^(a) But a pension in respect of past services, in respect of which no liability to future service exists, is (subject to the provisions of any Act of Parliament^(b)) assignable, and liable to be taken in execution for debt;^(c) and, in the event of the bankruptcy of a public official or pensioner, the Court may (in the case of a public official with the consent of the chief officer of his department) order the payment to the trustee in

bankruptcy of such portion of his salary or pension as the Court may think fit.^(d) The latter rule applies also to any salary or income not of an official character received by the bankrupt.^(e)

(a) *Stone v. Lidderdale* (1795), 2 Anst. 533.

Cooper v. Reilly (1829), 2 Sim. 560.

But the restriction is strictly confined to *public* offices, i.e. practically, offices under the Crown paid out of national funds (*In re Mirams*, [1891] 1 Q.B. 594, at p. 596, *per* CAVE, J.). Thus it applies to the half-pay of Army officers (*Flarty v. Odum* (1790), 3 Term Rep. 81; *Lidderdale v. Montrose (Duke)* (1791), 4 Term Rep. 248) which is probably now covered by s. 141 of the Army Act; and to the pay, half-pay, pensions, etc., of officers and men of the Royal Navy, including marines (Naval and Marine Pay and Pensions Act, 1865, s. 4 and 5). But it does not apply to the emoluments of a Canonry of Windsor (*Grenfell v. Dean and Canons of Windsor* (1840), 2 Beav. 44), nor to the salary of a workhouse chaplain, payable out of local rates (*In re Mirams, ubi supra*), nor to the income of a college fellowship (*Feistel v. King's College, Cambridge* (1847), 10 Beav. 491).

• (b) E.g. the last-mentioned statute, the Army Act, s. 141; the Police Pensions Act, 1921, s. 14. The pension of a retired ecclesiastical incumbent is also made unassignable by statute (Incumbents Resignation Act, 1871, s. 10), as amended by various Measures of the General Assembly of the Church of England.

(c) *Dent v. Dent* (1867), L.R. 1 P. & D. 366.

Willcock v. Terrell (1878), 3 Ex. D. 323.

Knill v. Dumergue, [1911] 2 Ch. 199.

(d) Bankruptcy Act, 1914, s. 51.

Re Lupton, Ex parte Official Receiver, [1912] 1 K.B. 107.

(e) Bankruptcy Act, 1914, s. 51 (2).

TITLE IV—SHARES, STOCKS, AND DEBENTURES

Shares

1565. For the purposes of this Title, a share means a numbered ^(a) aliquot undivided part, of a specific nominal value, of the nominal capital of an association (not being a partnership as defined in §§ 549-552 *ante*), whether incorporated or not,^(b) existing for the purpose of carrying on an undertaking, whether for profit or not, and ~~whether such~~ capital or any part of it, remains uncalled up, or not.^(c) Where the whole of the nominal value represented by the share has been paid, or is deemed to have been paid, into the funds of the association, the share is said to be “fully paid”; whether or not any further liability for calls remains upon it.^(d) All shares in companies incorporated under the Companies Clauses Consolidation Act, 1845,^(e) or the Companies (Consolidation) Act, 1908,^(f) or the Companies Act, 1929 ^(g) are personal estate; and each must be distinguished by an appropriate number,^(h) and registered in the name of the holder in the books of the company.⁽ⁱ⁾

(a) Companies Act, 1929, s. 62 (2).

(b) It seems quite clear that there may be shares in an unincorporated society, e.g. a building society certified under 6 & 7 Will. IV (1836), c. 32. Such societies are treated as still governed by the provisions of that statute; unless they have been incorporated under later legislation (Building Societies Act, 1894, s. 25 (2)).

(c) *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279, at p. 288.

The definition in the text is, it is submitted, a fair, though not, perhaps, a literal interpretation of the expressions of FARWELL, J., in the above case; but neither statute, nor, it is believed, judicial authority, has favoured the public with a formal definition of a “share”. By s. 380 (1) of the Companies Act, 1929, “share” means “share in the share capital of the company”. This effort can hardly be described as a definition. In the earlier Companies Acts (e.g. that of 1844, s. 2), great stress was laid on the fact that

a share was transferable without the consent of the holders of other shares in the undertaking; and this fact, doubtless, so far as it is true, does very readily distinguish an incorporated company from a private partnership. But, inasmuch as, in the case quoted, Mr. Justice FARWELL held that provisions in a company's articles of association forbidding the transfer of shares to outsiders so long as certain persons connected with the company were willing to purchase were lawful, and inasmuch as such provisions are now extremely common (being, indeed, expressly recognized by s. 26 of the Companies Act, 1929) for "private companies", the free transferability of shares can hardly be said to be an essential feature of their existence.

- (d) E.g. where the company is "unlimited".
- (e) *Ibid.* s. 7.
- (f) *Ibid.* s. 22 (1).
- (g) Companies Act, 1929, s. 62 (1).
- (h) Companies Clauses Consolidation Act, 1845, s. 6.
Companies Act, 1929, s. 62 (2).
- (i) Companies Clauses Consolidation Act, 1845, ss. 8, 9.
Companies Act, 1929, ss. 25 (2), 95.

Practically speaking, almost all corporations carrying on undertakings for commercial profit, as distinguished from mutual convenience and benefit, are governed by the provisions of one or the other of these last two statutes. Persons may be incorporated for the purpose of trade or otherwise by Letters Patent under the provisions of the Chartered Companies Act, 1837, as amended by the Chartered Companies Act, 1884; but, though such corporations frequently raise capital by shares, the nature and conditions of such shares are usually made the subject of special provisions in the charter of incorporation, and have little in common with ordinary commercial shares. Shares may exist in "building", "provident", "industrial", and similar societies; and such societies are often corporations (Building Societies Act, 1874, s. 9; Industrial and Provident Societies Act, 1893, s. 21). But their so-called "shares" also bear little analogy to ordinary commercial shares. On the other hand, shares in companies formed by private Acts of Parliament for carrying on public or quasi-public undertakings, e.g. water-works, railways, etc., are very like ordinary commercial shares; being largely regulated by the provisions of the Companies Clauses Act, above referred to. A company may be authorized to issue share warrants to bearer; with the result that the names of the owners of the shares affected need not appear on the register (Companies Act, 1929, s. 70 (1)).

1566. A "preference share" means a share the holder of which is entitled to participate in the profits of the undertaking in priority to another class or

"Preferred"
and "de-
ferred"
shares

other classes of shareholders ;^(a) and a "deferred share" means a share whose holder is postponed, in the distribution of such profits, to another class or other classes of shareholders.^(b) Subject to the terms of its memorandum or articles of association, a company registered under the Companies Act, 1929, may create preference shares ;^(c) but the number of founders or management or deferred shares created or proposed to be created must be stated in every prospectus issued by or on behalf of such company.^(d)

(a) The term "preference share" is statutory (Companies Clauses Act, 1863, s. 13). It is also familiar in practice, and has been used freely in the Courts. But there would seem to be no authoritative definition of it.

(b) This expression is also used, though not defined, in s. 35 (1) of the Companies Act, 1929; Sched. IV. Part I (2).

(c) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361.

(d) Companies Act, 1929, s. 35 (1); Sched. IV, Part I (2).

Stock

1567. "Stock" differs from shares in the facts, that (i) subject to the regulations affecting any particular issue, it may be held and divided into unequal amounts of any extent,^(a) and that (ii) no liability for the subscription of further capital, by calls or otherwise, can exist with regard to it.^(b) Any company registered under the Companies Act, 1929, may, if so authorized by its articles, convert into stock all or any of its paid-up shares of any denomination ;^(c) and any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may, in manner provided by that Act, convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up, into a capital general stock, to be divided among the shareholders according to their respective interests therein.^(d)

(a) This is the special convenience of stock, that it may be dealt with in any amount, however small (*Morrice v. Aylmer* (1875), L.R.

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- 7 H.L. 717, at p. 725, *per* Lord HATHERLEY). Of course the term "stock" is applicable to bodies, no shares in which could possibly be issued, e.g. the Commissioners of the National Debt and the Government of a Dominion.
- (b) That this is the essential feature of stock as distinguished from shares, to which a liability for unpaid calls may attach, may be seen by reference to s. 68 (14) of the Trustee Act, 1925, by virtue of which the expression "stock" in the statute includes fully paid-up shares.
 - (c) Companies Act, 1929, s. 50 (1) (c).
 - (d) Companies Clauses Consolidation Act, 1845, s. 61.

1568. The legal title to shares and stock in *Transfer* companies governed by the Companies Clauses Consolidation Act, 1845, and the Companies Act, 1929, and to British Government stock, can be acquired only by transfer registered in the books of the company, or by transfer in the books of the Bank of England respectively.^(a) But a company limited by shares, and registered under the Companies Act, 1929, may, if so authorized by its articles of association, issue under its common seal a warrant stating that the bearer of the warrant is entitled to any fully paid-up shares or stock therein specified; and such share warrant will entitle the bearer thereof to the shares or stock therein specified, and, on surrendering it for cancellation, to have his name entered as a member in the register of members.^(b)

- (a) Companies Clauses Consolidation Act, 1845, s. 15.
National Debt (Stockholders Relief) Act, 1892, s. 4.
Companies Act, 1929, ss. 65, 66.

- (b) *Ibid.* s. 37.

It is impossible to enumerate all the statutes applicable to transfers of different kinds of shares and stock; but the requirement of registration will be found to be universal. As to the form of transfer, legal requirements are much less uniform. The shares of companies governed by the Act of 1845, *supra*, require a deed (*ibid.* s. 14); those under the Act of 1929 are transferable "in manner provided by the articles of the company" (Act of 1929, s. 62 (1)). A certificate, under the seal of the company, specifying any shares or stock held by a member, is *prima facie* evidence of the title of such member to such shares or stock in a company registered under the Companies Act, 1929 (*ibid.* s. 68). But the register of members itself

is also "*prima facie* evidence of any matters by this Act directed or authorized to be inserted therein"—which would certainly include the ownership of shares and stock (*ibid.* ss. 102, 282.).

*No transfer
while call's
unpaid*

1569. No share in any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may be transferred, after a call has been made in respect thereof, until such call has been paid, as well as all calls for the time being due on any share held by the intending transferor.

Companies Clauses Consolidation Act, 1845, s. 16.

There seems to be no corresponding provision in the Companies Act, 1929; but such a provision in the articles of association is now assumed unless the contrary appears (Table A). As between the company and the shareholder, the person liable to pay the call is the person whose name was on the register when the call was made (*Re National Bank of Wales, Taylor, Phillips and Rickards' Cases*, [1897] 1 Ch. 298, at p. 306, *per* LINDLEY, L.J.). And the transferors of shares upon which a liability for the payment of uncalled-up capital remains, may be liable, in the event of the company being wound up within a year of the transfer, to the extent specified in s. 157 of the Act of 1929. But any surplus remaining after the company's debts for which they are responsible have been paid in full belong to them (*Re City of London Insurance Co., Ltd.*, [1932] 1 Ch. 226).

*Blank
transfer*

1570. A good equitable title to shares or stock (other than stocks or stock transferable only by deed) ^(a) in companies registered under the Companies Act, 1929, may be made, whether absolutely or by way of mortgage, by the execution by the alienor of a transfer of the shares or stock without filling in the name of the alienee, and the handing of such blank transfer, and the stock or share certificate, to the alienee. ^(b)

(a) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555.

(b) *Re Tahiti Cotton Co.* (1874), L.R. 17 Eq. 273.

France v. Clark (1884), 26 Ch. D. 257.

Colonial Bank v. Cady and Williams (1890), 15 App. Cas. 267, at p. 285, *per* Lord HERSCHELL.

Hooper v. Herts, [1906] 1 Ch. 549.

Fuller v. Glyn, Mills, Currie & Co., [1914] 2 K.B. 168.

If the Company refuses to register a transfer so completed, the Court may direct an account and may rectify the register by substituting the name of the transferee (Companies Act, 1929, s. 100).

And if the transferor improperly interferes to prevent the transferee getting himself registered as legal owner, he will be liable in damages (*Hooper v. Herts, ubi supra*). It is the unfortunate habit of text-book writers, and even of judges, to speak of a transfer of the kind described in this paragraph as a "pledge"—a practice which obscures the true nature of the transaction. Doubtless, if the transaction is by way of mortgage, the transferee becomes a pledgee of the document handed over; but he also acquires title to the shares or stock (*Fry v. Smellie*, [1912] 3 K.B. 282). No notice of any trust can, however, be entered on the company's register (Companies Act, 1929, s. 101).

1571. A company may have a lien on the shares (other than fully paid shares) held by any of its shareholders, in respect of unpaid calls, or other moneys due from such shareholders to the company. In the absence of provision to the contrary in the articles of association of a company registered under the Companies Act, 1929, such a lien will be deemed to have arisen; and the company may sell the shares, after fourteen days' notice, to reimburse itself the moneys due. *Lien for calls*

Companies Act, 1929, Sched. I, Table A, Clauses 7, 8, 10.

Similarly, in the absence of special provision, the company may refuse to register transfers of shares on which it has a lien; but if it registers a transfer its lien on the share covered by it is lost (*Higgs v. Assam Tea Co.* (1869), L.R. 4 Exch. 387). The right of the company to forfeit shares for non-payment of calls (which, in the case of companies under the Companies Clauses Act, 1845, is statutory (s. 29)) exists also in the case of companies under the Act of 1929, unless the provisions of Table A are excluded (Table A, Clauses 23–29). The Articles may grant a lien even on shares which are fully paid-up, but in such a case a quotation on the Stock Exchange cannot be obtained: and if the Articles give a lien only on shares not fully paid-up, the company can alter its articles so as to give a lien on all shares (*Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656).

1572. A "debenture", for the purposes of this Title, means an acknowledgment (not necessarily under seal^(a)) of indebtedness by an association, whether incorporated or not,^(b) and whether including a charge on the assets of the association ("mortgage *Definition of debenture*

debenture”), or not.^(c) Such acknowledgment must be for a specific sum of money ; but, if it includes a charge on the assets of the association, such charge may be made to trustees on behalf of a series of debenture holders, or it may be made directly to the holder of the debenture.^(d)

(a) *British India Steam Navigation Co. v. Inland Revenue Commissioners* (1881), 7 Q.B.D. 165.

(b) In the last-mentioned case, GROVE, J., remarked that he did not “remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body” (p. 168). But the learned judge admitted that there was no official definition of the term “debenture”; and, as a matter of fact, “debentures” are sometimes issued by non-corporate associations. Indeed it is not certain that an individual cannot issue debentures. Even the use of the word “debenture” is not essential (*Edmonds v. Blaina Furnaces Co.* (1887), 36 Ch.D. 215, at p. 220, *per* CHITTY, J.; see *R. v. Findlater*, [1939] 1 K.B. 594).

(c) *Edmonds v. Blaina Furnaces Co.*, *ubi supra*, at p. 219.
Jackson v. Rainford Coal Co., [1896] 2 Ch. 340, at p. 344, *per* CHITTY, J.).

Lemon v. Austin Friars Investment Trust, Ltd., [1926] Ch. 1.

In fact the document discussed in *British India Steam Navigation Co. v. Inland Revenue Commissioners*, *ubi supra*, contained no charge or agreement to give one.

(d) *Re Uruguay, etc., Rly. Co. of Monte Video* (1879), 11 Ch. D. 372.

Re Olaihe Silver Mining Co. (1884), 27 Ch. D. 278.

Where the sum secured by the acknowledgment is an indivisible sum, the security is known as a “debenture”, where it is a divisible sum which may be held in any quantity not exceeding the total amount owing by the association on the same security, it is called “debenture stock”.

*Power to
issue de-
bentures*

‘1573. Generally speaking, and in the absence of provision to the contrary expressed or implied in its memorandum or articles of association,^(a) an ordinary trading company has the right to borrow money for the purposes of its business, and to issue debentures therefor.^(b)

(a) *Re General Provident Assurance Co., Ltd.* (1869), 38 L.J. (Ch.) 320.
The head note of this report is far too wide.

(b) *Australian etc. Co. v. Mounsey* (1858), 4 K. & J. 733.
Bryon v. Metropolitan Saloon Omnibus Co., Ltd. (1858), 3 De G. & J. 123.

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These two cases were expressly followed in *General Auction Estate and Monetary Co. v. Smith*, [1891] 3 Ch. 432, where, however, it was not proposed to issue debentures. Apparently, public undertakings governed by the Companies Clauses Acts have no power to borrow on debentures without express authorization (Companies Clauses Act, 1863, s. 22). Special authority in the memorandum or articles of association is also required for charging uncalled capital (*Re Pyle Works* (1890), 44 Ch. D. 534; *Newton v. Anglo-Australian Investment Co.'s Debenture-holders*, [1895] A.C. 244). "Reserve capital" (i.e. capital which can only be called up in the event of the association being wound up) cannot be charged by an issue of debentures (Companies Act, 1929, ss. 49, 53; *Re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28); and the capital of a company limited by guarantee is in a similar position (*Re Irish Club Co., Ltd.*, [1906] W.N. 127). But a company governed by the Companies Clauses Act, 1845, which has power by its special Act to borrow on mortgage or bond, has power to charge its uncalled capital (s. 38).

1574. Where debentures comprise a charge on the assets of an association, such charge may be a *fixed* charge on specific assets, or it may be a "floating charge" on the assets of the association generally, present and future, or it may comprise both such kinds of charges. A floating charge will become a fixed charge on the assets then actually belonging to the association, on the occurrence of the event or events agreed upon in the debenture as fixing the charge.

Governments Stock and Other Securities Investment Co. v. Manila Rly. Co., [1897] A.C. 81, at p. 86, *per* Lord MACNAGHTEN.

Re Yorkshire Woolcombers' Association, [1903] 2 Ch. 284, at p. 295, *per* ROMER, L.J.

Cox Moore v. Peruvian Corp'n., Ltd., [1908] 1 Ch. 604.

Evans v. Rival Granite Quarries, Ltd., [1910] 2 K.B. 979, at p. 999, *per* BUCKLEY, L.J.

Re Griffin Hotel Co. Ltd., Joshua Tetley & Son, Ltd. v. Griffin Hotel Co., Ltd., [1941] Ch. 129.

A mere charge, even on specific assets, would only bind such assets in equity, i.e. as against persons acquiring them with knowledge of the charge, and against persons not acquiring the legal title. (*In re Morrison, Jones & Taylor, Ltd.*, [1914] 1 Ch. 50.) But, in fact, a debenture trust deed usually comprises a legal conveyance of specific assets. *Inter se*, debenture-holders presumably rank in order of date; unless, as is common though not essential (*Levy v. Abercorris*

Slate and Slab Co. (1887), 37 Ch. D. 260, at p. 264, *per* CHITTY, J.), the debentures are issued in a series, and it is provided that all in the series shall rank *pari passu*. If an earlier series of debentures comprises a floating charge on future-acquired assets, and a later series a specific charge on assets acquired between the two dates, but subject to the rights of the earlier series, the floating charge of the earlier series will, as respects such assets, take priority over the specific charge of the later (*Re Stephenson (Robert) & Co., Ltd.*, *Poole v. Stephenson (Robert) & Co., Ltd.*, [1913] 2 Ch. 201).

*Registration
of debentures*

1575. Debentures issued by companies governed either by the Companies Clauses Act, 1863, or by the Companies Act, 1929, must be registered in compliance with the terms of those statutes respectively.^(a) Unregistered debentures of the latter class of companies will be void against the liquidator or any creditor of the company.^(b) Registration under these provisions of a charge on land for securing money created by a company has effect as if the charge had been registered as a land charge under the Land Charges Act, 1925, and need not also be registered under that Act.^(c)

- (a) Companies Clauses Act, 1863, s. 28. (Apparently, in such cases, the company keeps the register, which is, however, open to inspection by certain classes of persons.)

Companies Act, 1929, s. 79. (Registration with Registrar of Companies); s. 88 (Registration in books of the Company.)

- (b) The effect of non-registration with the Registrar (s. 79) is to render the charge void against a liquidator and any creditor of the company; non-registration in the books of the Company (s. 88) does not affect the validity of the charge; the penalty is a statutory fine of £50 and that only where the omission is wilful.

- (c) Land Charges Act, 1925, s. 10 (5).
Companies Act, 1929, s. 79 (7).

*Foreclosure
by debenture-
holders*

1576. Debenture-holders of a company incorporated under the Companies Act, 1929, having a direct charge (fixed or floating) on the assets of the company, have, in addition to the ordinary remedies of a person having a charge on land (*ante*, § 1398) the right to foreclose the property included in the charge.^(a) But holders of debentures secured by a

overing deed in favour of trustees (*ante*, § 1572) re only entitled to a decree for the appointment of a receiver, enquiry as to amounts due to the various classes of debenture-holders, and directions for realization.^(b) And no order for foreclosure can in any case be made, unless all the debenture-holders entitled *ari passu* demand it.^(c)

(a) *Sadler v. Worley*, [1894] 2 Ch. 170.

In the case of a floating charge, Lord ATKINSON, in *De Beers Consolidated Mines, Ltd. v. British South Africa Co.*, [1912] A.C. 52, p. 70, expressed an opinion adverse to the possibility of foreclosure. And it seems extremely doubtful whether the rule applies to a public undertaking specially authorized by statute; even when carried on by a company incorporated under the Companies Act. At any rate, the Court refused to order a sale in such a case (*Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399); and it seems quite clear that neither foreclosure, nor sale, nor (*semble*) even the appointment of a manager, can be obtained against a company carrying on a public undertaking under the Companies Clauses Act, 1845 (*Gardner v. L.C. & D. Ry. Co.* (No. 1), (1867), 2 Ch. App. 201). But this latter rule does not apply when the undertaking has ceased to operate and is being wound up (*Re Glyn Valley Tramway Company*, [1937] Ch. 465).

(b) The proper form of action is by one or more holders on behalf of themselves and the others (see the form in Palmer, *Company Precedents*, 15th Ed. Part III, 534 *et seq.*). The trustees should be made defendants (*Mortgage Insurance Corporation, Ltd. v. Canadian Agricultural, Coal and Colonisation Co., Ltd.*, [1901] 2 Ch. 377). In the case of companies issuing debenture stock under the Companies Clauses Act, 1863, the right to a receiver is statutory in certain circumstances (*ibid.* ss. 25, 26).

(c) *Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

1577. Subject to the terms of the debenture, *Enforcement of debentures*
debenture-holder is entitled to commence proceedings to enforce his security—(a) when the payment of principal is in arrear,^(a) (b) when it can be proved to be in jeopardy, whether payment is in arrear, or not.^(b)

(a) *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547.

(b) *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318, at p. 322, *per* GIFFARD, L.J.

Hodson v. Tea Co. (1880), 14 Ch. D. 859.

Re Grigglesstone Coal Co., Stewart v. Grigglesstone Coal Co., [1906]
1 Ch. 523.

Re Tilt Cove Copper Co., Ltd., [1913] 2 Ch. 588.

The most obvious way of proving that the security is in danger is by showing that the company is being wound up. But it is not the only way.

*Transfer of
debentures*

1578. A mortgage debenture created under the provisions of the Mortgage Debenture Act, 1865, may be transferred by indorsement in the form specified in the Schedule to that Act.^(a) Debenture stock created under the provisions of the Companies Clauses Act, 1863, is transmissible and transferable in the same manner as other stock of the company, and has in all other respects the incidents of personal estate.^(b) A debenture payable to bearer is a negotiable instrument, and passes by delivery, independently of equities.^(c)

(a) Mortgage Debenture Act, 1865, s. 37, Sched. (Form E).

(b) Companies Clauses Act, 1863, s. 23.

(c) *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.*, [1898]
2 Q.B. 658.

Edelstein v. Schuler & Co., [1902] 2 K.B. 144.

Semble : other debentures are transferable in the same manner as things in action generally (see *post*, §§ 1626–1632). Would the rule in the text apply to debentures of a private company not dealt with on the Stock Exchange?

*Redemption
of debentures*

1579. An association which has issued debentures comprising a charge on any part of its assets, may redeem them at any time after the day fixed for payment of the sums for which the debentures are security ; and any “ clog ” on the right of redemption (*ante*, § 1389) will be void.^(a) But a debenture issued by a company registered under the Companies Act, 1929, may, by its express terms, be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.^(b)

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(a) *Samuel v. Farrah Timber and Wood Paving Corpn., Ltd.*, [1904] A.C. 323.

British South Africa Co. v. De Beers Consolidated Mines, Ltd., [1910] 2 Ch. 502.

Some doubts were thrown on the applicability of the doctrine of "clog" to debentures creating only a floating charge, in the House of Lords on the hearing of the appeal in the *De Beers Consolidated Mines, Ltd. v. British South Africa Co.*, ([1912] A.C. at p. 70, *per* Lord ATKINSON; at p. 71, *per* Lord HALSBURY; at p. 73, *per* Lords LOREBURN and GORELL). Lord ATKINSON, however, based his doubt at least partly on the argument that a debenture-holder had no right of foreclosure—an argument inconsistent with decided cases (*ante*, § 1625); and the Court of Appeal, in *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.* (1913), 29 T.L.R. 464, considered itself bound by the earlier decisions to hold that the doctrine of the "clog" applied to a floating charge. On appeal to the House of Lords, that decision was reversed, but without reference to the applicability of the doctrine ([1914] A.C. 25).

(b) Companies Act, 1929, s. 74.

A mortgage of land by a company to a single mortgagee is a debenture within the meaning of this section, and is not rendered invalid by reason of the date of redemption being postponed to a remote period (*Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] A.C. 613).

1580. Notwithstanding the provisions of §§ 251 and 256 *ante*, a contract with a company registered under the Companies Act, 1929, to take up and pay for any debentures of the company, may be enforced by an order for specific performance.

Contract to take up debentures

Companies Act, 1929, s. 76.

Generally speaking, a contract to lend or borrow money is not specifically enforceable; and this doctrine was applied to a contract to take up debentures (*South African Territories v. Wallington*, [1898] A.C. 309). The change in the law indicated in the text was first made by the Companies Act, 1907, s. 16.

1581. A "scrip certificate" is a written acknowledgment by the promoters of a company, or undertaking, or loan, of the right of the person named in it, or the holder of the certificate, to a specified number or amount of shares, stock, or debentures. Such certificate may be either absolute, or conditional

Scrip

upon some event happening ("provisional certificate"). Where the certificate is in favour of the "holder", the benefit of such certificate is legally transferable by mere delivery of the certificate.

Re Mexican and South American Mining Co., Barclay's Case (1858),
26 Beav. 177.

Re Mexican and South American Co., De Pass's Case (1859), 4 De G. &
J. 544.

TITLE V—PATENTS AND DESIGNS

1582. A patent, for the purpose of this Title, means the exclusive right of making, using, exercising, and vending a manufacture new within the realm.^(a) Such a right can only be granted to the true and first inventor or inventors of such manufacture, or his or their assignee,^(b) and for a period not exceeding sixteen years ;^(c) but, in the discretion of the Court, the period may be extended for a further time not exceeding ten years.^(d) All other monopolies of buying, selling, making, and working, or using anything within the realm, and all other monopolies of any kind, are, unless authorized by Act of Parliament, utterly void.^(e)

*Definition
of patent*

- (a) I.e. within the United Kingdom and the Isle of Man (*Brown v. Annandale* (1842), 8 Cl. & Fin. 437 ; Patents and Designs Act, 1907, s. 14).
- (b) Patents and Designs Act, 1932, Sched.
- (c) Statute of Monopolies (1623), ss. 1, 6.
Patents and Designs Act, 1907, s. 17 (1) ; as amended by the Acts of 1938, s. 2 (1) ; 1939, s. 3 (6).
- (d) Act of 1919, s. 7 ; Act of 1942, s. 1 (1). (The extension is usually only for five years ; but “ in exceptional cases ” it may be up to ten, *ibid.* (2). A patent may be extended as to one or more of its clauses only (*Re Lodge's Patent*, [1911] 2 Ch. 46).)
- (e) Statute of Monopolies (1623) s. 1.

The granting of monopolies was, at one time, subject to much abuse ; and the matter roused great feeling, which finally found its expression in the statute of 1623. This statute is still in force as the basis of patent law ; and the definition of “ invention ” is, in the later legislation (Act of 1907, s. 93), still incorporated by reference to it. But a somewhat careless judicial interpretation of the permissive clause of the old statute (s. 6) led to further abuses, which have been recently dealt with by the provision set out in § 1587 (iii) *post.* In theory, a patent is a privilege voluntarily granted by the favour of the Crown (Act of 1907, s. 97). In fact, it is claimable as of right by any applicant who fulfils the prescribed conditions, including the periodical payment of fees to the Crown (Act of 1907, ss. 1-13), as amended by s. 5 and Sched. of Act of 1919).

*Infringe-
ment of
patent*

1583. The owner of a lawful patent ("patentee"), has a *primâ facie* right to recover damages, or to have awarded in his favour an injunction against future infringements, against any person who infringes his monopoly, within the United Kingdom and the Isle of Man.^(a) But where a defendant proves that, at the date of the infringement, he was not aware, and had no reasonable means of making himself aware, of the existence of the patent, the patentee will not be entitled to recover damages in respect of the infringement.^(b)

- (a) Patents and Designs Act, 1919, s. 10. (Since the passing of the Chancery Amendment Act, 1858, the patentee has been able to obtain all his remedies in a single action. Before the passing of the Patents Act, 1919, the patentee could also ask for an account of his rivals' sales, with a view to claiming the profits; and it is now quite clear that the Court may not, even now, award him this remedy in the exercise of its discretion.)

It has previously been pointed out (*ante*, § 884,) that a threat of an action for infringement, not duly followed up, is itself a ground of action by any person aggrieved (Act of 1907, s. 36; Act of 1932, s. 6).

- (b) Patents and Designs Act, 1907, s. 33; 1932, s. 13.
Wilderman v. Berk (F.W.) & Co., [1925] Ch. 116.

*Definition
of infringe-
ment*

1584. Any unlicensed making,^(a) using,^(b) or selling^(c) of a patented article, or any other act which in fact makes use of the invention protected by the patent,^(d) is, *primâ facie*, an infringement of such patent.

- (a) *United Telephone Co. v. Sharples* (1885), 29 Ch. D. 164.

The making, to be a good ground of action, must be for use or sale, not merely for experiment (*Frearson v. Loe* (1878), 9 Ch. D. 48, at pp. 66-67, *per* JESSEL, M.R.).

- (b) *Nobel's Explosive Co., Ltd. v. Jones, Scott & Co.* (1881), 17 Ch. D. 721, at p. 741, *per* JAMES, L.J.

Saccharin Corp., Ltd. v. Jackson (1903), 20 R.P.C. 611.

- (c) Mere exposure for the purposes of sale amounts to an infringement (*British Motor Syndicate, Ltd. v. Taylor & Son, Ltd.*, [1901] 1 Ch. 122); but an offer for sale does not (*No-Fume, Ltd. v. Pitchford (Frank) & Co., Ltd.* (1935), 52 R.P.C. 231).

- (d) *Nobel's Explosives Co. Ltd. v. Anderson*, "*Cordite*" Case (1894), 11 R.P.C. 115, at p. 128, *per* ROMER, J.

1585. A patent binds the Crown to the same extent as it binds a subject ;^(a) except that any Government department may use the invention protected by it on such terms as may be agreed, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, on such terms as the Treasury may settle, after hearing all parties interested, and except that, where an invention has been recorded or tried by or on behalf of a Government department, such invention may be used by the Crown without license or royalty, unless it was in fact communicated by the patentee.^(b)

Patent binds Crown

(a) Patents and Designs Act, 1907, s. 29.

(b) Act of 1919, s. 8.

1586. A patentee may grant licences to any persons to exercise the invention ;^(a) and such persons will not, whilst acting in accordance with the terms (express or implied), of such licences, be guilty of infringing the patent.^(b)

Licences

(a) There seems to be no statutory authority for this proposition ; but it is implied throughout the Acts.

(b) Certain conditions, mostly placing restrictions on the activities of the licensee, cannot be included in licences (Patents and Designs Act, 1907, s. 38). And a licence to sell, or a sale by a patentee, includes an implied licence to the purchaser to sell again (*McGruther v. Pitcher*, [1904] 2 Ch. at p. 312, *per* COZENS-HARDY, L.J.).

Any patent may, at the request of the patentee, be indorsed "licences of right" ; and then any person can demand a licence on terms to be settled by the Comptroller. The holder of a patent so indorsed only pays half renewal fees (Act of 1919, s. 2). It is doubtful whether a mere licensee can sue in his own name for an alleged infringement of the patent (*Heap v. Hartley* (1889), 42 Ch. D. 461 ; *Scottish Vacuum Cleaner Co., Ltd. v. Provincial Cinematograph Theatres, Ltd.* (1915), 32 R.P.C. 353).

1587. A patent may be revoked on one or more of the following grounds, viz. :—

Revocation of patent

- (i) that it was granted, in the first instance, for an invention not satisfying the requirements

of the Statute of Monopolies, or to a person not entitled to the grant ;

Patents and Designs Act, 1907, s. 25 (2) ; 1932, s. 3.

(ii) that it was irregularly obtained ;

Patents and Designs Act, 1932, s. 3.

Nuttall v. Hargreaves, [1892] 1 Ch. 23.

(iii) that there has been an abuse of the rights granted thereby.

Patents and Designs Act, 1919, s. 1 ; 1932, s. 3.

Such an abuse is deemed to have taken place when, after three years from its date, the patent is not being worked on a commercial scale in the U.K., or such working is being hindered by importation of the article by the patentee or with his connivance, or the demand for the article in the U.K. is not being fairly met, or if licences are being unfairly withheld or granted only on unreasonable terms (*ibid.*). But the Comptroller need not take the extreme step of revoking the patent. He may order it to be subject to "licences as of right" (*ante*, § 1586, n.), or may order a licence to be granted to the applicant on terms as to raising capital for development, etc. (*ibid.*). Generally speaking, an objection to the validity of a patent, or a claim for its revocation, may be taken or made either as a defence to an action for infringement (Act of 1907, s. 25), or by petition to the Court (*ibid.*), or by application to the Comptroller (*ibid.* s. 26), subject to an appeal to the Court (*ibid.* ss. 26 (4), 27 ; Act of 1919, s. 1). Other, less important, grounds for revocation of a patent will be found enumerated in s. 3 of the Act of 1932.

Lapse of patents

1588. A patent lapses if the patentee fails to pay the prescribed fees within the prescribed times :^(a) but, if the failure to pay was unintentional,^(b) the patent may be restored by the Comptroller on the application of the patentee, after due notice to the public, and with due protection to persons who may have availed themselves of the subject-matter of the patent after it was announced as void in the Official Journal.^(c)

(a) Patents and Designs Act, 1907, s. 17 (2).

(b) *Ibid.* s. 17 (3).

Re Land's Patent, [1910] 2 Ch. 236.

The Act merely requires that the application shall state that the non-payment was unintentional. But the decision covers the view in the text.

(c) Patents and Designs Act, 1907, s. 20 (5), (6); 1919, Sched.

1589. *Semble* : the legal title to a patent can only be assigned by deed. But an equitable assignment of a patent, being in writing, may be entered on the Register of Patents. *Assignment of patent*

Re Casey's Patents, Stewart v. Casey, [1892] 1 Ch. 104.

It seems curious that the Acts are silent on the form of assignment; and the expression of opinion by the Court in the case quoted was really *obiter* as regards the first proposition in the paragraph. The Register is only *prima facie* evidence of title (Patents and Designs Act, 1907, s. 28 (3)); but proprietors, mortgagees, and licensees must now register their titles, though unregistered equitable rights may still be enforced, on equitable principles (Act of 1919, s. 16).

1590. A "design", for the purposes of this Title, means a new and original design for the pattern, shape, configuration, or ornament, or for any two or more of such purposes, of any article of manufacture or substance (not being a design for a sculpture within the protection of the Copyright Act, 1911 (*post*, § 1612)), which design is registered under the provisions of the Patents and Designs Act, 1907. *Design*

Patents and Designs Act, 1907, ss. 49, 93.

The fact that the design has been confidentially disclosed and subsequently published in breach of good faith before registration, and even the acceptance of a first and confidential order for goods bearing a *textile* design intended for registration, will not be fatal to the application to register (*ibid.* s. 55). Neither will the fact that the design, or goods made from it, has or have been exhibited at a certified industrial exhibition; if due notice of the applicant's intention to exhibit has been given to the Comptroller of Patents, and the application for registration has been made within six months of the opening of the exhibition (*ibid.* s. 59).

1591. Such registration confers in the first instance copyright in the design for a period of five *Effect of registration*

years from its date ; and such copyright will, on due application and payment of the prescribed fees, be renewed for a second and may be renewed for a third period of five years.

Patents and Designs Act, 1907, ss. 49 (5), 53.

The applications for registration and renewal are made to the Comptroller of Patents, subject to an appeal to the Board of Trade (*ibid.* s. 49).

*Protection of
registered
design*

1592. During the existence of such copyright, or such shorter period (not being less than two years from the date of registration) as may be prescribed, the design is not open to inspection by the public ; but any person furnishing sufficient information to enable the Comptroller of Patents to identify the design, and paying the prescribed fee, is entitled to be informed whether registration still exists, and in respect of what classes of goods, and of the date of registration, and of the name and address of the proprietor of the design.

Patents and Designs Act, 1907, ss. 56, 57.

*Infringe-
ments of
design*

1593. If, during the existence of such copyright, any person (*semble*, within the United Kingdom or the Isle of Man), except with the licence or written consent of the registered proprietor of the design, for the purposes of sale applies, or causes to be applied, to any article in any class of goods in respect of which the design is registered, the design itself or any fraudulent or obvious imitation thereof, or if, knowing that any such design or imitation has been applied without the consent of the registered proprietor of the design, any person publishes or exposes, or causes to be published or exposed, for sale, such article, such person will be liable to pay to such registered proprietor a sum not exceeding £50, recoverable as a simple contract debt, or, at the option of the regis-

tered proprietor, to an action for damages and an injunction.

Patents and Designs Act, 1907, s. 60.

But—

- (i) the total sum recoverable as a simple contract debt in respect of any one design will not exceed one hundred pounds ;

Ibid.

- (ii) the registered proprietor will not be able to recover any penalty or damages in respect of a breach of copyright of such design, unless he has caused (or shows that he took all proper steps to ensure such result) each article delivered by him on sale, to which such design has been applied, to be marked with the prescribed mark, words, or figures, denoting that such design is registered, or unless he shows that the infringement in question was committed after the infringer knew, or had received notice, of the existence of the copyright in such design.

Patents and Designs Act, 1907, s. 54.

The provision as to " threats actions " applicable to patents (*ante*, § 1583, n.), is applicable also to registered designs (s. 61) ; and registration may be cancelled at any time by the Comptroller, subject to appeal, on the ground that the design is not used for manufacture in the United Kingdom to a reasonable extent, though it is so used abroad, or on the ground that the design had been published in the U.K. before registration (Act of 1919, s. 14).

1594. A registered design binds the Crown in the same manner as it binds a subject.^(a) But the provisions of § 1585 *ante*, with regard to user of patents by Government departments, apply also to registered designs.^(b)

Rights of Crown

(a) Patents and Designs Act, 1907, s. 29.

(b) Patents and Designs Act, 1919, ss. 15, 58.

Some designs are exclusively Crown monopolies, e.g. military uniforms.

*Transfer of
design*

1595. *Semble* : the proprietorship of a registered design may be assigned by deed, writing, or word of mouth ;^(a) but the assignee cannot sue in respect of alleged infringement of the design, until he is entered as proprietor on the Register of Designs.^(b)

(a) Patents and Designs Act, 1907, s. 71.

There is nothing in the statute or rules requiring the assignment to be in any particular form ; but, possibly, the provisions of the Law of Property Act, 1925, s. 136 (*post*, § 1626), may by implication require a writing.

(b) *Woolley v. Broad*, [1892] 1 Q.B. 806.

TITLE VI—TRADE MARKS, TRADE NAMES, AND GOODWILL

1596. A trade mark, for the purposes of this Title, means any mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the ~~mark~~ whether with or without indication of the identity of that person. *Trade mark*

Trade Marks Act, 1938, s. 68 (1).

“Mark” includes a device, brand, heading, label, ticket name, signature, word, letter, numeral or any combination of these (*ibid.* s. 68 (1)). The law relating to trade marks is now consolidated in the Trade Marks Act, 1938, which came into force on 27th July 1938. The main changes effected by the statute include :

- (i) a new definition of “trade mark” as given in the text, though it is doubtful whether the new definition extends the one given in the Trade Marks Act, 1905, s. 3. In *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] A.C. 68, it was said that the somewhat wider language of the 1938 Act had not changed the meaning of “trade mark” which indicates the origin of goods. The House of Lords there decided that the owners of a process called the “Rysta” process for repairing ladies stockings could not register such name as a trade mark, for it so nearly resembled the word “Aristoc” in sound (which name had already been registered as a trade mark) as to cause confusion ; and further, a repair service is not “a connection in the course of trade”, for these words mean an association of the goods in the course of their production for the market (*ibid.* at p. 97).
- (ii) a trade mark may now be assigned apart from the goodwill of the business in respect of which it was registered (*post*, § 1601).
- (iii) a person may be registered as “the registered user” of a trade mark, and who may use such mark independently of the proprietor. In such case the registration can only be made on the application of the proprietor and the proposed user (Trade Marks Act, 1938, s. 28).

- (iv) provision is made for the registration of "certification trade marks", being marks adapted to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic (*ibid.* s. 37). These may now only be registered in the name of a person who does not carry on a trade in goods of the kind so certified (*ibid.* s. 37 (1)); and are only assignable with the consent of the Board of Trade (*ibid.* s. 37 (8)).
- (v) "defensive trade marks" may be registered in respect of invented words (*ibid.* s. 27 (1)).

*Registration
of trade
marks*

1597. A trade mark which satisfies the requirements of the Trade Marks Act, 1938, may be registered in the Register of Trade Marks at the Patent Office. Such mark is then known as a "registered trade mark".

Trade Marks Act, 1938, ss. 1, 17, 19.

The Register is divided into Part A and Part B (*ibid.* s. 1 (2)). The qualifications of a registrable trade mark in Part A are set out in *ibid.* s. 9 and must consist of a name or signature, or a word or words including invented words or any other distinctive mark. To be registrable in Part B, the mark must be capable, in relation to the goods in respect of which it is registered, of distinguishing goods with which the proprietor of the mark is connected in the course of trade from goods in the case of which no such connection subsists (*ibid.* s. 10). Certain classes of marks may not be registered (*ibid.* s. 11, 15 (3), 61). No trust is to be entered on the register (*ibid.* s. 64 (1)).

*Renewal of
registration
and remedies*

1598. The registration of a trade mark operates for a period of seven years, and may be renewed from time to time for further periods of fourteen years.^(a) During the continuance of any such period, the proprietor of a valid registered trade mark^(b) has the exclusive right to the use, in the United Kingdom, of such trade mark, upon or in connection with the goods in respect of which it is registered; ^(c) and (*semble*) in the case of any infringement of his exclusive right by another person, may bring an action for damages or an account and an injunction, in the same way as for any other tort of the like nature.^(d)

(a) Trade Marks Act, 1938, s. 20 (1), (2).

In the case of registrations made before 27th July 1938, the initial registration lasts for fourteen years, (*ibid.* s. 20 (1)).

When a trade mark has been allowed to lapse, it may be re-registered at any time within a year from its removal from the register, unless the Registrar is satisfied that there has been no *bonâ fide* user of it during the two years immediately preceding the removal, or that there is no liability of confusion by reason of the previous use of the trade mark (*ibid.* s. 20 (4)).

- (b) The validity of a trade mark may be disputed either (i) on the application to register (s. 18 (2)), or (ii) in an action for infringement, or (iii) on a special application for removal from the register (s. 32). But registration is *primâ facie* and, after seven years (except where it has been obtained by fraud or the mark is immoral or scandalous), conclusive evidence of validity (ss. 13 (1), 46); and, where the validity of a registered trade mark has been unsuccessfully impeached in legal proceedings, the Court may grant a certificate of validity which, in subsequent proceedings alleging invalidity of that mark, will entitle the proprietor, if successful, to full costs as between solicitor and client (s. 47).

(c) *Ibid.* ss. 4, 5.

(d) *Edelsten v. Edelsten* (1863), 1 De G. J. & Sm. 185.

Slazenger & Sons v. Spalding & Brothers, [1910] 1 Ch. 257.

It is now specifically provided (s. 4 (1) (a), (b)) that user in the course of trade so as to deceive or cause confusion, or so as to import a reference to the registered proprietor or user is actionable. And certain specific acts are deemed not to be infringements (s. 4 (3)). Presumably, any breach of the rights conferred by the Act would be a tort, and, as such, would entitle the proprietor to the usual remedies for a tort. As regards marks registered in Part B, no relief is to be granted "in respect of such registration", against user not calculated to deceive (s. 5 (2)). *Semble*: no actual damage need be proved in an action for infringement.

1599. No registration under the Trade Marks Act, 1938, will interfere with any *bonâ fide* use by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of his goods. *User of own name, etc.*

Trade Marks Act, 1938, s. 8 (a), (b).

For a similar point in connection with "passing off" cases see *post*, § 1603.

1600. A trade mark may be removed from the register on the application of any person aggrieved *Removal from register*

on the ground that it was not properly capable of registration, or on the ground that it was registered by the proprietor or a predecessor in title without any *bonâ fide* intention to use it in connection with such goods, or that there has in fact been no such *bonâ fide* user within five years prior to the application.

Trade Marks Act, 1938, ss. 26, 32.

In the latter case, the application may be defeated by showing that the non-user is due to special circumstances in the trade (*ibid.* s. 26 (3)).

*Transfer of
trade mark*

1601. A registered trade mark is assignable and transmissible with or without the goodwill (*post* §§ 1604-1608) of the business in respect of which it may have been registered, ^(a) and it may be assigned for all or some only of the goods in respect of which it was registered ^(b). The assignee of the trade mark is entitled to be registered as proprietor, on proving his title to the satisfaction of the Registrar ^(c).

(a) Trade Marks Act, 1938, s. 22 (1).

(b) *Ibid.* s. 22 (2).

Prior to the Trade Marks Act, 1938, trade marks were only assignable as incidental to the goodwill of a business, and were not assignable apart from such goodwill (Trade Marks Act, 1905, s. 22). In the case of assignments made before 27th July 1938, otherwise than with the goodwill of the business, application by the assignee for registration must be made within two years of this date (Act of 1938, Sched. III, 2 (1)).

(c) *Ibid.* s. 25 (1).

Where an assignment of a trade mark is made without the goodwill of a business, and is made after 27th July 1938, the assignee must within six months apply for directions to the Registrar (*ibid.* s. 22 (7)).

*Unregistered
trade marks*

1602. No person may take any proceedings to prevent, or recover damages for, any infringement of an unregistered trade mark.

Trade Marks Act, 1938, s. 2.

*"Passing
off"*

1603. Independently of the proprietorship of any trade mark, a person whose name, description, signs,

labels, or goods is or are imitated so closely by a rival in business as to lead the public to believe that it is purchasing such person's goods, is entitled to take proceedings to stop such imitation, and for an account of profits or for damages.^(a) It is not necessary for him to prove that the defendant's conduct was, in fact, fraudulent.^(b) *Semble* : the mere use of the defendant's own name cannot amount to a "passing off".^(c)

(a) *Montgomery v. Thompson*, [1891] A.C. 217.

Reddaway v. Banham, [1896] A.C. 199.

Birmingham Vinegar Brewery Co. v. Pocock, [1897] A.C. 710.

The right to take such proceedings is expressly reserved by the Trade Marks Act, 1938, s. 2. The fact that a patent once held by the plaintiff for the goods in question has been revoked, will not, necessarily, be fatal to a "passing off" action (*Edge v. Nicolls*, [1911] A.C. 693).

(b) *Millington v. Fox* (1838), 3 My. & Cr. 338.

Saxlehner v. Apollinaris Co., [1897] 1 Ch. 893.

Spalding & Brothers v. Gamage (A.W.) Ltd. (1915), 84 L.J.(Ch.) 449.

It would appear that, where the defendant has not been guilty of fraud, no account or damages will be awarded against him (*Edelsten v. Edelsten* (1863), 1 De G.J. & Sm. 185, at p. 199, *per* Lord WESTBURY, C., followed by Lord BLACKBURN in *Singer Manfg. Co. v. Loog* (1882), 8 App. Cas. 15, at p. 31).

(c) *Burgess v. Burgess* (1853), 3 De G.M. & G. 896.

Turton v. Turton (1889), 42 Ch. D. 128.

Brinsmead (John) & Sons, Ltd. v. Brinsmead and Waddington & Sons, Ltd. (1913), 29 T.L.R. 706, C.A.

There is a considerable difference on the last point between an individual and a corporate defendant. Inasmuch as a corporation's name is artificially acquired, it is much easier to persuade the Court that it has been adopted or used for unfair objects than in the case of a birth name (*Brinsmead (John) & Sons v. Brinsmead (T.E.) & Sons, Ltd.* (1896), 13 T.L.R. 3, C.A. ; *Kingston, Miller & Co., Ltd. v. Kingston (Thomas) & Co., Ltd.*, [1912] 1 Ch. 575). But where a patent has expired, even if the patented article has been sold under a specific description (not containing the plaintiff's name), the plaintiff cannot prevent the sale of it by rivals under the same description (*Linoleum Manufacturing Co. v. Nairn* (1878), 7 Ch. D. 834). And an attempt to do so by registering the description as a trade mark will be defeated (*Re Ralph's Trade-Mark, Ralph v. Taylor* (1883), 25 Ch. D. 194, at p. 199, *per* PEARSON, J. ; *Magnolia Metal Co.'s Trade*

Marks, [1897] 2 Ch. 371; *Re Gestetner's Trade Mark*, [1908] 1 Ch. 513).

Goodwill

1604. The goodwill of a business, practice, or undertaking is the benefit of the trade connection, and other incidental advantages, of such business, practice, or undertaking.^(a) Goodwill may exist apart from any site or buildings.^(b)

(a) *Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147.

Churton v. Douglas (1859), John. 174.

Trego v. Hunt, [1896] A.C. 7.

Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd., [1901] A.C. 217.

It must, of course, be remembered, that the acquisition of goodwill does not of itself include the current rights and liabilities of the business.

(b) This was for some time doubted, owing to a definition by Lord ELDON in *Crutwell v. Lye* (1810), 17 Ves. 335, at p. 346. But, while it is obvious that the goodwill of certain businesses, e.g. a publican's, would have little value apart from the premises on which they were conducted, it is equally clear that the value of the goodwill of others, e.g. a newspaper or a professional practice, is largely independent of the precise buildings in which they may hitherto have been carried on. This fact is fully recognized by the cases quoted above.

"Goodwill" may be regarded as property at its vanishing point; for it is clear that the purchaser of "goodwill" can neither (a) compel the customers of the former proprietor to continue to deal with him, nor (b) prevent strangers, or even (subject to §§ 1606, 1607) the vendor, competing with him for the business of such customers. Nevertheless, the importance of established custom and habit in business affairs is so great, that large sums of money are constantly paid for the mere chance of securing the consequences of them. The Court of Exchequer was, therefore, merely recognizing facts, when it definitely decided, in *Potter v. Inland Revenue*, *ubi supra*, that goodwill was "property". It has now crept into statute law (Landlord and Tenant Act, 1927, ss. 4-6).

Rights of purchaser to use name of vendor

1605. The voluntary sale of the goodwill of a business entitles the purchaser to use the name or style of such business so long as it is carried on by him.

Levy v. Walker (1879), 10 Ch. D. 436.

Burchell v. Wilde, [1900] 1 Ch. 551.

Townsend v. Farman, [1900] 2 Ch. 698.

The purchaser must not, however, use the vendor's name in such a way as to expose the vendor to personal liability (*Thynne v. Shove* (1890), 45 Ch. D. 577).

1606. The voluntary vendor of the goodwill of a business will not be allowed to solicit the customers of such business, and will be restrained from doing any acts which will enable him to do so.^(a) But he cannot, in the absence of express agreement,^(b) be restrained from carrying on a similar business on his own account ;^(c) and a bankrupt, the goodwill of whose business has been sold by his trustee in bankruptcy without his concurrence, may carry on a rival business and solicit his old customers.^(d)

*Soliciting
customers of
old business*

(a) *Trego v. Hunt*, [1896] A.C. 7.

Gillingham v. Beedlow, [1900] 2 Ch. 242.

Curl Brothers, Ltd. v. Webster, [1904] 1 Ch. 685.

A person who enters into partnership on the terms that the goodwill of the business shall belong to the other partners, is in the same position as a vendor for this purpose (*Trego v. Hunt, ubi supra*). *Curl Brothers, Ltd. v. Webster, ubi supra*, shows that, even after the old customers have voluntarily returned, he must not solicit them.

(b) And, of course, any such agreement will be "in restraint of trade" and, as such, only valid if it is reasonable (*ante*, § 195).

(c) *Churton v. Douglas* (1859), John. 174.

Johnson v. Helleley (1864), 2 De G.J. & Sm. 446.

(d) *Cruttwell v. Lye* (1810), 17 Ves. 335.

Walker v. Mottram (1881), 19 Ch. D. 355.

Fennings v. Fennings, [1898] 1 Ch. 378.

1607. The voluntary vendor of the goodwill of a business will also be prevented from using the name or style of such business in any competing business carried on by him ; even when such name or style is, or comprises, his own individual name.

*Vendor using
old name*

Churton v. Douglas, ubi supra.

Pomeroy (Mrs.), Ltd. v. Scalé (1906), 23 T.L.R. 170.

1608. In the dissolution of a partnership by the Court, the value of the goodwill of the business will always be taken into account.

*Value of
goodwill*

Hill v. Fearis, [1905] 1 Ch. 466.

TITLE VII—COPYRIGHT

*Literary
copyright*

1609. Copyright in a literary work means, for the purposes of this Title, the sole right (i) to multiply and publish copies, whether written or printed, and whether in the original tongue or a translation, of the whole or any substantial part of any book, pamphlet, handbill, map, chart, plan, table, compilation, or other document intended by the author to convey its meaning wholly or mainly by the use of words or abbreviations of or symbols for words, whether accompanied by drawing or colouring, or not, and having an original character; (ii) to make any record or other contrivance by means of which such work may be mechanically performed or delivered; (iii) in the case of a lecture, address, speech, or sermon, to deliver it, either orally or by means of any mechanical instrument, in public; (iv) to convert the work into a dramatic work by way of performance in public or otherwise, and (v) to authorize any of the above acts.

Copyright Act, 1911, ss. 1 (2), 35 (1).

This and the following three paragraphs are an attempt to separate and distinguish between several species or forms of copyright, which, to the confusion of the public, are mixed up, in an ambitious effort towards brevity, in s. 1 (2) of the Copyright Act, 1911. It should, however, be carefully observed throughout this Title that copyright, unlike patent rights (Title V, *ante*) is not a monopoly of a process, but only of a product, i.e. the owner of a copyright complaining of infringement must prove that the alleged infringer did in fact copy (directly or indirectly) his (the complainant's) work.

*Dramatic
copyright*

1610. Copyright in a dramatic work means, for the purposes aforesaid, the sole right (i) to perform, or authorize the performance of, the whole or any substantial part of any dramatic work, including a play, recitation, choreographic work or entertainment in dumb show the scenic arrangement or act-

ing form of which is fixed in writing or otherwise, and also any cinematograph production where the arrangement or acting form or the combination of incidents represented gives the work an original character, (ii) to convert it, to authorize it to be converted, into a novel, or other non-dramatic work, (iii) to make or publish, or authorize to be made or published, copies or translations of such dramatic work, and (iv) to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.

Copyright Act, 1911, ss. 1 (2), 35 (1).

The rights of the makers of such contrivances are, presumably, subject to the rights of the composers of the works reproduced, in so far as they have not been acquired by such makers (*Gramophone Co. v. Carwardine & Co.*, [1934] Ch. 450).

1611. Copyright in musical work means, for the purposes aforesaid, the sole right (i) to perform, and to authorize the performance of, in public, the whole or any substantial part of a musical work, (ii) to multiply and publish, and to authorize the multiplication and publication of, copies of the score, and (iii) to make, or authorize the making of, any record, perforated roll, or other contrivance by means of which such work may be mechanically performed or delivered. *Musical copyright*

Copyright Act, 1911, ss. 1 (2), 35 (1).

Semble : there is no definition of "musical work" in the Act of 1911 ; but there is an attempted definition in section 3 of the Musical (Summary Proceedings) Copyright Act, 1902, which is not repealed by the Act of 1911.

1612. Copyright in artistic work means, for the purposes aforesaid, the sole right to reproduce and multiply, and to authorize the reproduction and multiplication of, copies of the whole or any substantial part of any work of painting, drawing, sculp- *Artistic copyright*

ture, or artistic craftsmanship, or of any architectural work of art, engraving, or photograph. But as regards an architectural work of art, copyright does not extend to processes or methods of construction.

Copyright Act, 1911, ss. 1 (2), 35 (1).

*Duration of
copyright*

1613. Copyright exists during the life of the author of a work and fifty years after his death ; whether the work has or has not been published in his lifetime.

Copyright Act, 1911, ss. 3, 31.

But—

- (i) in the case of a work of joint authorship, the copyright lasts during the life of the joint author who dies first, and fifty years afterwards, *or* during the life of the joint author who dies last, whichever period is the longer ;

Copyright Act, 1911, s. 16 (1), (3).

- (ii) in the case of a literary, dramatic, or musical work, or an engraving, wherein copyright existed at the death of its author (or, in the case of joint authorship, at or immediately before the death of the author who died last), but which has not been published or performed in public (or, in the case of a lecture, delivered in public) before such death, the copyright will last until publication, or performance or delivery in public, and for fifty years afterwards ;

Copyright Act, 1911, s. 17 (1).

Ownership of the MS. of an unpublished, unperformed, or undelivered work, acquired by testamentary disposition of the author is *prima facie* evidence of ownership of the copyright (*ibid.* (2)).

- (iii) in the case of photographs, and of contrivances by which sounds may be mechanic

ally reproduced, copyright will last for fifty years from the making of the original negative or plate from which the photograph or contrivance was directly or indirectly derived ;

Copyright Act, 1911, ss. 19 (1), 21.

In other respects, perforated rolls, etc., rank as " musical works ", and enjoy the protection of copyright (*ibid.*).

(iv) in the case of works in which copyright existed on the 30th June 1912, the existing copyright is converted into the copyright described in this Title, except that, where the owner was not at such date entitled (in the case of musical or dramatic works) to performing right, he does not obtain the sole right to perform the work or any part thereof in public ; and that where the owner of the performing right was not, at such date, entitled to the copyright, he continues to keep the sole right of public performance for the extended period, but does not get the other advantages of copyright.

Copyright Act, 1911, s. 24 and Sched. I.

1614. The copyright in any work belongs, in the first instance, to the author or his representatives.^(a) *Title to copyright*
 The owner of copyright may assign it, wholly or partially, by written assignment, signed by himself or his duly authorized agent.^(b) But, when the author of a work is the first owner of the copyright therein,^(c) an assignment by him (other than an assignment by statement) will be operative to vest in the assignee any rights beyond the expiration of twenty-five years from the author's death ; and the reversionary interest expectant on the termination of that period will, notwithstanding any agreement to the contrary, but subject to § 1616, devolve on (the author or ^(d)) his personal representatives as part of his estate.^(e)

- (a) Copyright Act, 1911, s. 5 (1).
- (b) *Ibid.* s. 5 (2). (Assignment in writing clearly includes a testamentary disposition.)
- (c) It is rather difficult to see how, under the Act, anyone but the author could be the first owner of the copyright; except where the work is made in the course of the author's employment under a contract of service or apprenticeship (s. 5 (1) (b)).
- (d) Presumably, the reversionary interest actually belongs to the author; though any assignment of it by him (other than testamentary) would be ineffectual.
- (e) Copyright Act, 1911, s. 5 (2).

*Existing
copyright*

1615. Where a copyright was in existence immediately before the 1st July 1912, but was not vested in the author of the work, the owner does not, under the Copyright Act, 1911, acquire any extension of the copyright; but, at the date when, but for the passing of the Copyright Act, 1911, it would have expired, the copyright will pass to the author or his personal representatives for the residue of the period described in § 1613 (iv) *ante*. But the owner of the copyright on the 1st July 1912 (or his successors in title) has, on giving the prescribed notice, the right of pre-emption for such extended period, or the right of production during such extended period, on terms to be settled by agreement or arbitration, and the right to be compensated for any unexhausted expenditure or liability incurred, before 26th July 1910, in connection with the reproduction or performance of such work in a manner which at the time was lawful, or with a view to its reproduction or performance at a time when such reproduction or performance would, but for the passing of the Copyright Act, 1911, have been lawful.

Copyright Act, 1911, s. 24.

*Work done
to order*

1616. Where in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some person other than the author, and made for valuable consideration in pursuance of such

order, the person giving such order will (in the absence of agreement to the contrary) be the first owner of the copyright ; and, in any other case, where the work was made by the author in the course of his employment as a servant or apprentice, the employer will (in the absence of agreement) be the first owner of the copyright.

Copyright Act, 1911, s. 5 (1) (a) and (b).

The section seems to assume that an article or other contribution contributed to a " newspaper, magazine, or similar periodical " will not become the copyright of the proprietor of the periodical, unless the contributor was a servant or apprentice ; for it gives the contributor a right* to prohibit its reproduction in separate form. If this is a correct view, the Act has substantially altered the law as laid down in *Lawrence and Bullen, Ltd. v. Aflalo*, [1904] A.C. 17, which was, however, a case of an encyclopædia, not of a periodical. There is no definition of an " author " in the statute ; but the translator of a work is the " author " of the translation (*Byrne v. Statist Co.*, [1914] 1 K.B. 622).

1617. An infringement of copyright is committed by any person who, without the consent of the owner of the copyright :— *Infringement of copyright*

- (i) does any act which such owner has, by virtue of the Copyright Act, 1911, sole right to do (§§ 1609-1612 *ante*) ; or,
- (ii) does any of the following acts, viz. :—
 - (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire,
 - (b) distributes, either for purposes of trade or to such an extent as to affect prejudicially the owner of the copyright,
 - (c) by way of trade exhibits in public,
 - (d) imports for sale or hire into any part of His Majesty's Dominions to which the Copyright Act, 1911, extends,
 any work which, to his knowledge, infringes copyright, or would infringe copyright if

it had been made within the part of His Majesty's Dominions in or into which such act took place ; or

- (iii) for his private profit, permits a place of entertainment to be used for the public performance of any copyright work, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Copyright Act, 1911, s. 2.

The owner of a broadcasting set, though he may allow the ordinary inmates of his premises to listen to the reproduction, is guilty of an infringement of copyright if he allows the public to listen to the reproduction without the permission of the owner of the copyright of the work reproduced (*Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121, C.A. ; *Fennings v. Stephens*, [1936] Ch. 469 ; *Ernest Turner Electrical Instruments, Ltd. v. Performing Right Society, Ltd.*, [1943] Ch. 167).

*Acts not in-
fringements*

1618. The following acts are not infringements of copyright, viz. :—

- (i) fair dealing with any work, for purposes of private study, research, criticism, review, or newspaper summary ;
- (ii) the use, by the author of an artistic work, who is not the owner of the copyright, of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, without thereby repeating or imitating the main design of the work ;
- (iii) the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, permanently situate in a public place or building, or (provided that they are not in the nature of architectural drawings or plans) of any architectural work of art ;

- (iv) the publication in a collection (mainly composed of non-copyright matter), *bonâ fide* intended for the use of schools and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools ; but not more than two passages may be published from one author by the same publisher in five years, and the source of all passages quoted must be acknowledged ;
- (v) the publication, in a newspaper, of a report of a public lecture, report of which is not prohibited by express conspicuous written or printed notice ;
- (vi) the reading or recitation in public by one person of any reasonable extract from any published work ;

Copyright Act, 1911, s. 2 (1).

- (vii) the publication of a newspaper report of an address of a political nature delivered at a public meeting ;

Copyright Act, 1911, s. 20.

- (viii) in the case of a musical work, the making (after due notice and on payment of the statutory royalties) of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, where similar contrivances have been previously made by, or with the consent or acquiescence of, the owner of the copyright in the work.

Copyright Act, 1911, s. 19 (2).

There are special and somewhat complicated provisions in the section on the subject of musical works or mechanical records published or made before the commencement of the Act (s. 19 (7), (8)).

*Reproduction
of old works*

1619. Copyright is not deemed to be infringed by the reproduction of a copyright work twenty-five years (or, in the case of a work in which copyright existed on the 16th December 1911, thirty years) after the death of the author ; if the person reproducing the work proves that he has given the prescribed notice in writing of his intention so to do, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, at the rate of ten *per cent.* on the published price.

Copyright Act, 1911, s. 3.

The form of notice and the method of paying royalties may be prescribed by the Board of Trade (*ibid.*).

*Compulsory
licences*

1620. Where, at any time after the death of the author of a literary, dramatic, or musical work, which has been published or performed in public, it appears, on complaint to the Judicial Committee of the Privy Council, that the owner of the copyright has refused to allow republication or performance in public, and that, by reason of such refusal, the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce it or perform the work in public, on such terms, and subject to such conditions, as the Judicial Committee may think fit.

Copyright Act, 1911, s. 4.

It will be observed that there is no power to compel the production of an unpublished work.

*Scope of
copyright*

1621. Copyright arises in respect of works published in any part of His Majesty's dominions to which the Act extends, whether by British subjects or not, and (in the case of an unpublished work) in respect of works of British subjects, wherever resident, and, in the case of other persons, if resident in any part of such dominions to which the Act extends,^(a)

and will be protected against all infringements within such dominions.^(b) But it will not be protected in respect of infringements in any of the self-governing Dominions of the Crown,^(c) unless the provisions of the Copyright Act, 1911, are declared by the legislature of such dominion to be in force therein.^(d)

- (a) But protection may be refused to the works, published within the British Empire, of authors who are subjects of a foreign country which does not give, or undertake to give, adequate protection to the works of British authors (Copyright Act, 1911, s. 23).

For the purposes of the provisions of the Act as to residence, an author is deemed to be resident in any part of the British dominions to which the Act extends, if he is domiciled therein (s. 35 (5)).

- (b) Copyright Act, 1911, s. 1 (1).
 (c) These are, the Dominions of Canada and New Zealand, the Commonwealth of Australia, the Union of South Africa, and Newfoundland (s. 35).
 (d) *Ibid.* s. 25 (1). (The adoption of the Act by a Dominion may be certified by a Secretary of State by notice in the *London Gazette* (*ibid.* (2).) As to the effect of such a notice, see *Mansell v. Star Printing and Publishing Co. of Toronto, Ltd.*, [1937] A.C. 872. Reciprocal protection may be given by Order in Council where the dominion, though not adopting the Act, affords adequate protection for the works of authors resident in the British Empire outside the dominion in question (s. 26 (3)).

Arrangements may also be made by Order in Council for giving whole or partial effect to the provisions of the Copyright Act, 1911, in respect of works published in a foreign country, or made by residents in a foreign country; but only after the making of a convention by which reciprocal rights are secured in such country for the proprietors of British copyright (ss. 29, 30). The latter rights are, obviously, not created or enforced by English law; and the details of the former must be sought in the Orders in Council affecting such countries respectively. Such countries are said to be within the Copyright Union, and have accepted, with more or less reservation, the resolutions of the Berne Convention of 1886 the Berlin Convention of 1908, and the Rome Convention of 1928. They include most of the civilized States of the world, but not the United States of America. The benefits of the Act may also be extended, by Order in Council, to British Protectorates (s. 28).

1622. The owner of a copyright or any interest therein, whose rights have been infringed, has the ordinary civil remedies by way of an action for *Remedies for infringement.*

damages, or account of profits, and an injunction against the infringer.

Copyright Act, 1911, s. 6 (1).

Costs of all proceedings are in the absolute discretion of the Court. *Ibid.* (2).

But—

- (i) where the defendant proves in such action that he was not aware of, and had no reasonable ground to suspect, the existence of the copyright, the plaintiff will not be entitled to any remedy other than an injunction ;

Copyright Act, 1911, s. 8.

- (ii) where the construction of a building or other structure which infringes, or would, if completed, infringe, copyright, has been commenced, no injunction restraining its completion, or ordering its demolition, will be granted ;

Copyright Act, 1911, s. 9.

Obviously, if the infringer, in such a case, proves that he was an innocent offender, no remedy at all lies against him.

- (iii) an action in respect of infringement of copyright must be commenced within three years next after the infringement.

Copyright Act, 1911, s. 10.

This period is not affected by the Limitation Act, 1939, for that Act is not to apply to any action for which a period of limitation prescribed by any other enactment (*ibid.* s. 32). See *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co.*, [1939] A.C. 178.

*Forfeiture
of pirated
copies*

1623. Subject to § 1618 (i) and (ii), all infringing copies of any work in which copyright exists, and all plates used or intended to be used in or for the production thereof, are deemed to be the property of the owner of the copyright, who may take proceedings for recovery of possession thereof, or in respect of the conversion thereof.

Copyright Act, 1911, s. 7.

It seems very doubtful on the Act whether this provision applies to an innocent infringer (s. 8) ; and it does not apply to buildings or other structures which constitute infringements of copyright (s. 9 (2)). For some kinds of infringement of copyright, the infringer is liable to criminal prosecution, resulting in fine or, in case of repetition, imprisonment (ss. 11-13). See particularly the Dramatic and Musical Performers Protection Act, 1925, s. 1 ; and *Musical Performers' Protection Association v. British International Pictures, Ltd.* (1930), 46 T.L.R. 485 ; *Gaumont British Distributors, Ltd. v. Henry*, [1939] 2 K.B. 711.

1624. In addition to his other remedies, the owner of copyright may, on taking the proper steps, and complying with the Regulations on the subject, cause the importation into the United Kingdom (which, for this purpose, does not include the Isle of Man) of infringing copies of his work, to be prohibited. *Prohibition of importation*

Copyright Act, 1911, s. 14.

1625. No rights in the nature of copyright, other than those conferred or recognized by the Copyright Act, 1911, can be claimed in any literary, dramatic, musical, or artistic work. *Abolition of "common law right"*

Copyright Act, 1911, s. 31.

Thus the old so-called "common law right" in unpublished material is abolished ; copyright now running from production, or "making", not from publication. But the remedies conferred by the Musical Copyright Acts of 1902 and 1906 are expressly reserved by the Act of 1911.

SECTION XIII

ALIENATION OF CHOSSES IN ACTION

TITLE I—VOLUNTARY ALIENATION

*Legal assign-
ment*

1626. Subject to the exceptions and provisions contained in Section XII, an absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only)^(a) of any debt or other legal thing in action, of which express notice in writing^(b) has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, and which has been accepted by the assignee,^(c) is effectual in law (subject to § 1564) to pass or transfer the legal right to such debt or thing in action from the date of such notice,^(d) and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.^(e)

(a) This clause does not exclude an assignment by way of mortgage in the ordinary form, i.e. absolute assignment with a proviso for redemption (*Durham Brothers v. Robertson*, [1898] 1 Q.B. 765; *Bateman v. Hunt*, [1904] 2 K.B. 530); nor an assignment upon trust (*Comfort v. Betts*, [1891] 1 Q.B. 737). But it does exclude, even though the word "assign" is used, a mere charge or security (*Mercantile Bank of London v. Evans*, [1899] 2 Q.B. 613), and, it now seems, an assignment even of a definite part of an ascertained debt (*Forster v. Baker*, [1910] 2 K.B. 636; *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; *Williams v. Atlantic Assurance Co.*, [1933] 1 K.B. 81). *Semble*, however, the assignee may get a good equitable title to such part.

(b) The notice, though it must be express, need not be formal. Any document which indicates to the person liable the existence of the assignment, is sufficient (*Denney, Gasquet and Mescalfe v. Conklin*, [1913] 3 K.B. 177; *The Zigurds* (No. 3), [1934] A.C. 209; cf. *James Talcott, Ltd. v. John Lewis & Co., Ltd. and North American Dress Co., Ltd.*, [1940] 3 All. E.R. 592).

(c) *Rekstin v. Severo Sibirsko, etc.*, [1933] 1 K.B. 47, C.A.

(d) And, therefore, in the absence of fraud, or knowledge by a later assignee of an earlier assignment, successive assignments will rank, not in order of date, but in order of notice to the debtor (*English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q.B. 700). The "date of such notice" is the date when the debtor received it or was in a position to receive it (*Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1; cf. *Alexander v. Steinhardt, Walker & Co.*, [1903] 2 K.B. 208).

(e) Law of Property Act, 1925, s. 136 (1).

The scope of this enactment, which replaces s. 25 (6) of the Judicature Act, 1873, is extremely difficult to ascertain; and two obvious questions encounter the interpreter, viz. (i) what rights are things in action within the meaning of the section? and (ii) which of these are "legal"? Regard being had to the wording of the section itself, it can hardly be assumed to include interests such as patents, trade marks, goodwill, or even stocks and shares, as to which there is no "debtor, trustee, or other person" liable, to whom notice of assignment can be given (*Torkington v. Magee*, [1902] 2 K.B. 427, at p. 430, *per* CHANNELL, J.). But there would seem to be no *prima facie* difficulty in including all other forms of incorporeal personal property. Again, what is a "legal" chose in action? Properly speaking, in 1873, it should have meant only rights capable of being enforced in a Common Law Court, i.e. practically, only claims for debts or damages; and, as the Judicature Act dealt primarily with procedure, it might well be supposed that this was the meaning of the word "legal" in this connexion. But the use of the word "trustee" in the subs. seems to indicate that ordinary claims by a beneficiary against his trustee are intended to fall within its scope; though these were clearly not enforceable at law in 1873. Apparently, by a sort of prolepsis, the framers of the Act regarded the intended fusion of jurisdictions as already accomplished, and used the word "legal" in the sense of "enforceable in a court of justice". At any rate, the Judicial Committee has declined to express any dissent from the view laid down in a Dominion Court, to the effect that the phrase includes "all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful" (*King v. Victoria Insurance Co., Ltd.*, [1896] A.C. at p. 256); and it is quite certain that many claims enforceable only in equity were by Courts of Equity treated as assignable. On the other hand, it is equally clear that the section does not make rights assignable which were not, prior to the Act, regarded as voluntarily transferable either at law or in equity, e.g. claims to unliquidated damages in tort (*ante*, § 772). It seems, then, the safest conclusion to draw, that all that the section has done is to allow an assignee, when its provisions have been complied with, to sue in his own name in any court, instead of requiring him to resort to a Court of Equity to compel the assignor to lend the use of his name. Thus, for example, the

assignee of the benefit of a claim under an insurance policy, even though the assignment is only by way of mortgage, can now sue the insurance company in his own name (*Swan and Cleland's Graving Dock and Slipway Co. v. Maritime Insurance Co. and Croshaw*, [1907] 1 K.B. 116). Finally, it may be added that the section does not exclude the application of the general rule that no transfer of property other than a conveyance of land by deed (§ 1360 *ante*) is complete until the transferee has intimated his acceptance of it (*Rekstin v. Severo Sibirsko, etc., ubi supra*); but it is questionable whether this would apply to an assignment by deed.

*Subject to
equities*

1627. Such assignment will be subject to all claims, whether legal or only equitable, which, at the time when he received notice of the assignment, the debtor, trustee, or other person liable would have been entitled to raise by way of defence or set-off, against the assignor seeking to enforce the chose in action.

L.P.A., 1925, s. 136 (1).

Newfoundland Govt. v. Newfoundland Ry. Co. (1888), 13 App. Cas. 199.
Stoddart v. Union Trust, Ltd., [1912] 1 K.B. 181.

In the last case, the party liable sought in vain to set up, against the assignee, a plea of fraud which, the contract having been confirmed, could not be used as a defence to the action on the contract, but only as an independent claim in tort against the assignor.

*Gratuitous
assignment*

1628. The provisions of § 1626 apply as well to gratuitous assignments as to assignments for valuable consideration.

Harding v. Harding (1886), 17 Q.B.D. 442.

Re Williams, Williams v. Ball, [1917] 1 Ch. 1.

Re Westerton, Public Trustee v. Gray, [1919] 2 Ch. 104.

In spite of the plain words of the section and the fact that voluntary assignments of things in action had been enforced in Equity long before 1873 (*Bates v. Dandy* (1741), 2 Atk. 207, Lord HARDWICKE, C.), much doubt on this point has been expressed. But is it really suggested that a person cannot make a legal gift of a bond, even to a stranger?

*Interpleader
by party
liable*

1629. If the debtor, trustee, or other person liable in respect of such debt or thing in action has received notice that any such assignment is disputed by the assignor or any person claiming under him, or of any

other opposing or conflicting claims to such debt or thing in action, he may call upon the rival claimants to interplead, or pay the sum due from him into Court under the Trustee Act, 1925.

Law of Property Act, 1925, s. 136 (1).

Trustee Act, 1925, s. 63.

This provision does not affect the provisions of the Policies of Assurance Act, 1867.

1630. Future debts arising out of an existing contract may be validly assigned at law under the provisions of § 1626 as against the debtor ;^(a) but an assignment of future debts which will not arise until conditions involving the carrying on of the assignor's business have been fulfilled, will not be valid against the trustee in bankruptcy of the assignor, if the conditions have not been fulfilled before the commencement of the bankruptcy.^(b)

*Assignment
of future
debts*

(a) *Brice v. Bannister* (1878), 3 Q.B.D. 569.

Walker v. Bradford Old Bank (1884), 12 Q.B.D. 511.

Jones v. Humphreys, [1902] 1 K.B. 10, at p. 13, per ALVERSTONE, C.J.

Skipper and Tucker v. Holloway and Howard, [1910] 2 K.B. 630, at p. 634, per DARLING, J.

(b) *Re Jones, Ex parte Nichols* (1883), 22 Ch. D. 782.

In re Davis & Co., Ex parte Rawlings (1888), 22 Q.B.D. 193, at p. 199.

Wilmot v. Alton, [1897] 1 Q.B. 17.

There is not much authority for saying that debts to arise in the future out of an existing contract, as distinguished from debts due but not yet payable, can be legally assigned; even apart from the question of bankruptcy. But *Walker v. Bradford Old Bank, ubi supra*, seems to justify the view. It is, however, generally assumed that future things in action were not within the terms of the Judicature Act, 1873, s. 25 (6). Section 4 (2) of the Law of Property Act, 1925, s. 4 (2) is confined to interests in land.

1631. A valid equitable assignment of any thing in action can be made by word of mouth or writing not in accordance with the provisions of § 1626 ;^(a) except that no assignment of any equitable interest or trust can be made otherwise than by writing signed

*Equitable
assignment*

by the assignor or by his agent thereunto lawfully authorized, or by his testament.^(b) But no merely equitable assignment of a legal thing in action will entitle the assignee to sue the person liable without joining the assignor;^(c) and an equitable assignment of a future thing in action, not arising out of an existing contract, even though made by deed, requires a valuable consideration.^(d)

- (a) *Re Row, Ex parte South* (1818), 3 Swan. 392.
Diplock v. Hammond (1854), 5 De G.M. & G. 320.
Brandts (William) Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454.

Of course, no assignment will bind the party liable until he has notice of it; and the assignee takes subject to all equities between the assignor and the party liable (*Torkington v. Magee*, [1903] 1 K.B. 644).

- (b) Law of Property Act, 1925, s. 53 (1) (c) (not confined to trusts of land).
 Wills Act, 1837, s. 3.
 (c) *Torkington v. Magee*, [1902] 2 K.B. 427, at p. 430, *per* CHANNELL, J.
Glegg v. Bromley, [1912] 3 K.B. 474, at p. 489, *per* PARKER, J.
Performing Right Society v. London Theatre of Varieties, Ltd., [1924] A.C. 1.

The objection of want of parties cannot be insisted on if it is clear that the assignor has no interest in the proceedings (*Brandts (William) Sons & Co. v. Dunlop Rubber Co.*, *ubi supra*, at p. 462).

- (d) *Meek v. Kettlewell* (1843), 1 Ph. 342.
Tailby v. Official Receiver (1888), 13 App. Cas. 523.
Re Ellenborough, Towry Law v. Burne, [1903] 1 Ch. 697.
Glegg v. Bromley, [1912] 3 K.B. 474.

No consideration is required for the validity of a completed assignment of existing things in action (*Kekewich v. Manning* (1851), 1 De G.M. & G. 176; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82, C.A.; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. at p. 591, *per* COZENS-HARDY, L.J.); an equitable assignment of an equitable chose in action does not need consideration (*Harding v. Harding* (1886), 17 Q.B.D. 442); but it is assumed that an equitable assignment of a legal chose in action does require consideration to support it, though *Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1 has been taken as deciding the contrary (*Quaere*: was there not consideration present in that case?). *Tailby v. Official Receiver* is important also as overruling the doctrine laid down in *Belding v. Read* (1865), 3 H. & C. 955, and *Re D'Epineuil (Count) (No. 2), Tadman v. D'Epineuil* (1882), 20 Ch. D. 758, to the effect that an assignment

for valuable consideration, of future things in action not limited to any particular source, is not enforceable, even in Equity.

1632. In the case of an assignment of future things in action, consisting of claims upon a fund, the claims of rival assignees rank in the order in which notices of their assignments have been received by the trustee or holder of the fund after he has obtained effective control of the fund out of which payment is to be made.

Notice in case of future choses in action

Johnstone v. Cox (1881), 19 Ch. D. 17.
Re Dallas, [1904] 2 Ch. 385.

1633. Things in action (including debentures^(a) and future interests in chattels corporeal^(b)) are not within the provisions of the Bills of Sale Acts, 1878 and 1882,^(c) or the Sale of Goods Act, 1893,^(d) or, unless they are debts due or growing due to the bankrupt in the course of his trade or business ("book debts"), the "order and disposition" provisions of the Bankruptcy Act, 1914.^(e)

Certain Acts not applicable

(a) Bills of Sale Act, 1882, s. 17.

(b) *Re Triton, Ex parte Singleton* (1889), 61 L.T. 301.
Re Thynne, Thynne v. Grey, [1911] 1 Ch. 282.

(c) Bills of Sale Act, 1878, s. 4.

(d) Sale of Goods Act, 1893, s. 62 (1).

(e) Bankruptcy Act, 1914, ss. 38 (c), 43.

TITLE II—INVOLUNTARY ALIENATION

Bankruptcy

1634. Upon an adjudication in bankruptcy there passes to the trustee in bankruptcy^(a) the ownership of all the things in action belonging beneficially to the bankrupt at the commencement of the bankruptcy,^(b) including debts due and growing due to the bankrupt in the course of his trade or business, as to which any assignee thereof has not taken steps to remove them from the order and disposition of the bankrupt.^(c) Things in action acquired by the bankrupt, after his adjudication but before his discharge, will also pass to his trustee in bankruptcy ; subject to the provisions of §§ 1429–1432 *ante*.^(d)

(a) Bankruptcy Act, 1914, s. 18.

The property passes from trustee to trustee on appointment, without formal transfer (s. 53).

(b) For the meaning of this expression see *ante*, § 1429 (d).

(c) Bankruptcy Act, 1914, s. 38 (c).

Rutter v. Everett, [1895] 2 Ch. 872.

(d) Bankruptcy Act, 1914, s. 38 (a).

Disclaimer by trustee

1635. The trustee in bankruptcy may, subject to the conditions specified in §§ 1430–1432 *ante*, disclaim any shares or stock in companies, or unprofitable contracts, or any other things in action of the bankrupt, which are unsaleable by reason of their binding the “ possessor ” thereof to the performance of any onerous act or to the payment of any sum of money.^(a) And the Court may, on the application of anyone who is, as against the trustee, entitled to the benefit, or subject to the burden, of a contract made with the bankrupt, rescind such contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable.^(b)

(a) Bankruptcy Act, 1914, s. 54 (1).

(b) *Ibid.* s. 54 (5).

1636. A judgment creditor may (subject to *Garnishmen. of debts* §§ 460, 1564 *ante*), obtain an order for attachment and payment to himself of any debt owing or accruing due to his judgment debtor, by means of garnishee proceedings against the person owing such debt ("garnishee").^(a) Service of a garnishee order or notice thereof will bind the debt in the hands of the garnishee;^(b) but it will not be binding on the trustee in bankruptcy of the judgment debtor, unless the attachment is completed by receipt of the debt by the judgment creditor before the commencement of the bankruptcy.^(c)

(a) O. XLV, r. 1. (O. XXVII, r. 1 of C.C. Rules.)

The judgment must be still "unsatisfied", i.e. the judgment debtor must be actually in arrears under it (*White, Son and Pill v. Stennings*, [1911] 2 K.B. 418).

(b) O. XLV, r. 2.

(c) Bankruptcy Act, 1914, s. 40 (1), (2).

The effect of payment into Court "to abide further order" is not to "complete" the attachment (*Butler v. Wearing* (1885), 17 Q.B.D. 182).

1637. For the purposes of § 1636, "debt" includes (i) a sum of money in the hands of a receiver in an administration action, payable to the judgment debtor,^(a) (ii) the proceeds of an execution levied by the sheriff at the suit of the judgment debtor,^(b) (iii) an annuity or other sum of money in the hands of trustees, payable to the judgment debtor,^(c) (iv) money arising from the property of a married woman restrained from anticipation (*ante*, §§ 1696-1700), provided that it was payable to her before the date of the garnishor's judgment,^(d) and (v) funds received by an Insurance Committee for distribution among the doctors on its panel.^(e) *Debts capable of being garnished*

(a) *Re Cowan's Estate, Rapier v. Wright* (1880), 14 Ch. D. 638, as modified by *Webb v. Stenton* (1883), 11 Q.B.D. 518.

- (b) *Re Greer, Napper v. Fanshawe*, [1895] 2 Ch. 217.
- (c) *Webb v. Stenton*, *ubi supra*.
- (d) *Head Bairs v. Heriot*, [1896] A.C. 174.
- (e) *O'Driscoll v. Manchester Insurance Committee*, [1915] 1 K.B. 811.

*Execution
against
securities*

1638. Bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money belonging to a judgment debtor, may be seized under a writ of Fieri Facias or County Court execution, and enforced for the benefit of the judgment creditor.

Judgments Act, 1838, s. 12.

County Courts Act, 1934, s. 123.

In a High Court action, the sheriff sues on the securities, and hands the proceeds to the creditor (Judgments Act, 1838, s. 12). In a County Court action, the creditor sues in the name of the debtor (County Courts Act, 1934, s. 123).

*Charging
order*

1639. A charging order in favour of any creditor who has obtained judgment in the High Court may be made against any interest, legal or equitable, of the judgment debtor in any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), ^(a) including stocks, funds, annuities, or shares in Court.^(b) Such order will have the same effect as if a charge in the creditor's favour had been given on such stocks, funds, annuities, or shares, by the judgment debtor; but it cannot be enforced until six months from the date of the order.^(c)

(a) Judgments Act, 1838, ss. 14, 15.

(b) Judgments Act, 1840.

(c) Judgments Act, 1838, s. 14.

} These sections are all repealable
by Rules of Court (Supreme
Court of Judicature Act, 1925,
s. 99).

Meanwhile, the charging order may be protected by a "stop order" (in the case of a fund in Court), or by notice to the company or other body concerned (O. XLVI, rr. 4-13), which takes the place of the old writ of Distringas (*ibid.* r. 2). A separate judgment creditor of a partner can obtain a charging order against his debtor's interest in the partnership, under s. 23 of the Partnership Act, 1890.

1640. In any case in which things in action which belong to a judgment debtor, and are liable for payment of his debts,^(a) cannot be reached by any of the other methods specified in this Title,^(b) the Court may, in the exercise of its discretion, appoint a receiver of the debtor's interest, present or future,^(c) with a view to its realization for the benefit of the creditor.^(d) *Appointment of receiver*

(a) *Holmes v. Millage*, [1893] 1 Q.B. 551 (future salary).

Cadogan v. Lyric Theatre, Ltd., [1894] 3 Ch. 338 (future profits of theatre).

Edwards & Co. v. Picard, [1909] 2 K.B. 903 (future earnings of patent).

In these cases the Court held that there was no realizable thing in action. The object of the procedure is merely to overcome technical difficulties, not to enlarge the scope of liability; though in fact it does the latter, in the cases to which it applies. But (*semble*) since *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, there can be no doubt that a voluntary alienation of the future rights discussed in the above cases would be valid.

(b) *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K.B. 373.

(c) *Tyrrell v. Painton*, [1895] 1 Q.B. 202.

Ideal Bedding Co., Ltd. v. Holland, [1907] 2 Ch. 157.

(d) *Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. at p. 135, *per* Cotton, L.J.

The appointment of a receiver does not create any charge on the thing in action (*Ridout v. Fowler*, [1904] 2 Ch. 93), or give the creditor a right to an order for sale (*Flegg v. Prentis*, [1892] 2 Ch. 428), or any priority over earlier equitable claimants to the fund (*Arden v. Arden* (1885), 29 Ch. D. 702). But it does give the creditor priority over subsequent equitable claims (*Re Anglesey (Marquis), De Galve (Countess) v. Gardner*, [1903] 2 Ch. 727).

1641. A judgment creditor may obtain from the Court a charging order on the funds in the hands of a receiver of the debtor's assets appointed by the Court, and such charging order will give priority to the judgment creditor over the general creditors of the debtor. *Charge on assets*

Newport v. Pougher (1937), 53 T.L.R. 291, C.A.

In this case the receiver was appointed in an action for dissolution of a partnership which was clearly insolvent. But it would seem to apply in cases of other receiverships.

PART IV
PROPERTY GENERALLY

SECTION XIV

POWERS OF APPOINTMENT OVER PROPERTY

*Kinds of
powers*

1642. Independently of, or annexed to, property belonging to himself, a person may be given, by instrument *inter vivos* or by testament,^(a) a power to appoint property of any kind to himself or another person or persons, or to himself and another person or persons.^(b) The person creating the power is known as the “ settlor ” or “ donor ” of the power ; the person to whom the power is given is called the “ donee ” of the power. If the donee has no interest in the property to be appointed, his power is said to be “ collateral ”.^(c) If he has an interest in such property, but his interest would not be affected by an exercise of the power, his power is said to be “ in gross ”.^(d) If the donee’s interest in such property would be affected by the exercise of the power, his power is said to be “ appendant ”.^(e) All powers, whether coupled with an interest or not, may be disclaimed or released by deed, by the donee thereof.^(f)

(a) It seems to be generally assumed, that a power to dispose of a legal estate in land can only be created *inter vivos* by deed and a power to dispose of any other interest in land only by writing, sealed or unsealed ; and this view is borne out by the Law of Property Act, 1925, ss. 52 and 53. There appears to be absolutely no authority on the mode of creation of powers of appointment of pure personality, unless s. 136 of the same Act applies to powers over things in action. Needless to say an attempt to create a power of appointment of any kind by word of mouth only would be extraordinarily foolish, and would, probably, be ignored by the Courts.

(b) There was at one time a doctrine that a power of appointment could not exist separately in an owner in fee. But this doubt was dispelled in *Clere’s Case* (1600), 6 Co. Rep. 17 b ; followed by Lord Eldon in *Maundrell v. Maundrell* (1805), 10 Ves. 246.

- (c) *Edwards v. Sleater* (1665), Hard. 410, at p. 413, *per* HALE, C.B.
Dickenson v. Teasdale (1862), 1 De G.J. & Sm. 52, at p. 59, *per*
 Lord WESTBURY, C.
- (d) *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228, at
 p. 232, *per* JESSEL, M.R.
Nottidge v. Dering, Ruban v. Dering, [1909] 2 Ch. 647.
- (e) *Penne v. Peacock* (1734), Cas. temp. Talb. 41. (The expression
 "appendant" does not, however, appear in the report.)
Re D'Angibau, Andrews v. Andrews, ubi supra.
- (f) Law of Property Act, 1925, ss. 155, 156. (The release may be
 effected by a contract not to exercise the power; but such contract
 must, *semble*, be by deed (*ibid.* s. 155). There appears to be no
 doubt that a married woman, even though "restrained from antici-
 pation", can release or disclaim a power (*ibid.* s. 168); Law
 Reform (Married Women and Tortfeasors) Act, 1935, s. 2).

The Common Law courts knew, in a limited class of cases, of powers of disposition over the legal estate in land, e.g. the power which a landowner, under local custom, might confer on his executor, to sell his lands for the payment of his debts or other purposes. By the passing of the Statute of Wills, 1540, such "common law" powers were created by testators independently of custom; and were in familiar use until the passing of the Land Transfer Act, 1897, s. 1, although they could only be employed to create common law estates, i.e. estates such as could have been limited by feoffment or other common conveyance. But there can be little doubt that, historically speaking, the bulk of the modern powers of appointment or disposition are derived from the practice, early established, of conveying lands to feoffees, to hold upon the uses to be declared by the donor's testament. The subsequent testament was, in effect, a declaration of uses, which, before 1535, were, of course, purely equitable. The passing of the Statute of Uses, in that year, put a temporary stop to the exercise of powers of appointment of land by testament. But it only rendered more efficacious the exercise of powers *inter vivos*; and, after the passing of the Statute of Wills, in 1540, the practice of appointing by testament revived. "Equitable" powers, or powers which only enable the donee to appoint equitable interests, are, however, recognized; and, presumably, all powers of appointment created since 1925 are "equitable powers", for they operate only in equity (Law of Property Act, 1925, s. 1 (7)); i.e. the owners of the legal estate must convey in accordance with the appointment (*Re Town, Dixon v. Brown* (1886), 32 Ch. D. at p. 601, *per* KAY, J.). As to the important differences between the effect of the exercise of legal and of equitable powers, see *Cloutte v. Storey*, [1911] 1 Ch. 18.

1643. A minor cannot exercise a power in *Minors*
 possession^(a) nor a power appendant or appurtenant^(b)
 over real estate; but may exercise a power

collateral^(c) over such property. And as to personal property a minor may exercise a power collateral and a power in gross^(d); but he may only exercise a power appendant or appurtenant where the donor has shown an intention that he should do so during infancy.^(e)

(a) *Hearle v. Greenbank* (1749), 3 Atk. 695.

(b) *King v. Bellord* (1863), 1 Hem. & M. 343.

(c) *Hearle v. Greenbank*, *ubi supra*.

(d) *Re D'Angibau, Andrews v. Andrews* (1879), 15 Ch. D. 228.

(e) *Re Cardross's Settlement* (1878), 7 Ch. D. 728.

Re D'Angibau, Andrews v. Andrews, *ubi supra*.

General and
special
powers

1644. Powers of appointment are either "general", where the donee may exercise them in favour of any persons he pleases,^(a) or "special", where the donee may only exercise the power in favour of a limited class of persons.^(b) The donee of a general power may exercise it in his or her own favour, or in favour of his or her wife or husband.^(c)

(a) *Mackinley v. Sison* (1837), 8 Sim. 561.

Bristow v. Skirrow (No. 1) (1859), 27 Beav. 585.

Re Dilke, [1921] 1 Ch. 34.

(b) *Bristow v. Warde* (1794), 2 Ves. 336.

(c) *Holder d. Sulyard v. Preston* (1769), 2 Wils. at p. 402, *per Curiam*.

Irwin v. Farrer (1812), 19 Ves. 86.

Wood v. Wood (1870), L.R. 10 Eq. 220.

A general power of appointment is, for most purposes, equivalent to ownership, and is treated as such. It passes (if exercisable by act *inter vivos*) to the donee's trustee in bankruptcy for the benefit of his creditors (*ante*, § 1429); and, if exercised by his testament, it makes the property appointed assets for payment of his debts after his death (*post*, § 2121); a power may be neither "special" nor "general", e.g. a power to appoint to anyone except a named person or group (*Re Jones, Public Trustee v. Jones*, [1945] Ch. 105), though such a power would appear to be a "special" one for the purposes of s. 27 Wills Act, 1837 (*post*, § 1645 (iii)).

Form of
exercise

1645. Generally speaking, a power of appointment can only be exercised in manner and with the formalities prescribed by the settlement creating the power, and by an act intended to exercise the power.

Hughes v. Wells (1852), 9 Hare, 749, at p. 763, *per* TURNER, V.C.
Re Sanderson, Sanderson v. Sanderson (1912), 106 L.T. 26.

But—

- (i) a power to appoint by testament can only be exercised by a document conforming to the requirements of the Wills Act, 1837; and a testamentary power so exercised will, as respects the execution and attestation thereof, be valid, whatever the requirements of the settlement;

Wills Act, 1837, s. 10.

- (ii) a power to appoint by deed or writing not testamentary will be validly exercised, so far as execution and attestation are concerned, by an appointment made by deed made after 13th August 1859, attested by two or more witnesses in the manner in which deeds are ordinarily attested;

Law of Property Act, 1925, s. 159 (1).

Of course, all additional requirements of substance, e.g. the consent of a third party, if any, must be fulfilled.

- (iii) a general devise or bequest of the real or personal estate of the testator, or of his real or personal estate in any place, or in the occupation of any person mentioned in his testament, or otherwise described in a general manner, will be construed to include any estate, or any estate to which such description may extend, which he may have power to appoint in any manner that he may think proper, unless a contrary intention appears by the testament;

Wills Act, 1837, s. 27.

It should be noted that, while no power that is not "general", in the sense of § 1644, can fall within this section of the Wills Act (*Re Williams, Foulkes v. Williams* (1889), 42 Ch. D. 93), yet it is not every such power which does fall within it (*Phillips v. Cayley* (1889), 43 Ch. D. 222; *Re Davies, Davies v. Davies*, [1892] 3 Ch. 63). It

seems, however, that an ordinary general testamentary power will do so (*Re Doherty-Waterhouse, Musgrave v. De Chair*, [1918] 2 Ch. 269). A difficult problem arises when an attempted exercise of a general testamentary power fails by reason of the death of the appointee before the testator, or for any other reason. Is the fund then assets for payment of the testator's debts and legacies? The answer depends upon whether the testator is deemed to have "made the fund his own for all purposes" (*Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314). It seems now to be settled, that a mere appointment of an executor, followed by a direction to pay debts and legacies, will be a sufficient exercise of the power to make the fund assets for that purpose (*Re Seabrook, Gray v. Baddeley*, [1911] 1 Ch. 151). A general power of appointment now includes the power to dispose by testament of an entailed interest under s. 176 of the Law of Property Act, 1925 (Administration of Estates Act, 1925, s. 32 (1)).

- (iv) the Court, in its discretion, may, where the appointor's intention is clear,^(a) supply any want or defect^(b) in the exercise of the power, not going to the substance thereof,^(c) in favour of creditors,^(d) purchasers,^(e) a wife,^(f) or blood relative of the donee of the power,^(g) or charities.^(h)

- (a) *Carver v. Richards* (1859), 27 Beav. 488, at p. 495, *per* ROMILLY, M.R.
- (b) *Cockerell v. Cholmeley* (1830), 1 Russ. & M. at p. 424, *per* LEACH, M.R.
- (c) Thus, though the Court may support an exercise by testament instead of by deed (*Sneed v. Sneed* (1747), 1 Amb. 64), the converse will not hold; because, by executing a deed, the donee relinquishes that power of revocation which the settlor intended him to retain until his death (*Reid v. Shergold* (1805), 10 Ves. 370). Nor will Equity ever supply the non-exercise of a power (*Buckell v. Blenkhorn* (1846), 5 Hare, 131); unless, possibly, where the exercise has been prevented by the fraud of a party taking in default of appointment.
- (d) *Pollard v. Greenoil (Lady)* (1660), 1 Cas. in. Ch. 10.
Wilkie v. Holme (1752), 1 Dick. 165.
- (e) *Cotter v. Laver* (1731), 2 P. Wms. 623.
Re Dykes' Estate (1869), L.R. 7 Eq. 337.
- (f) *Tollet v. Tollet* (1728), 2 P. Wms. 489.
Chapman v. Gibson (1791), 3 Bro. C.C. 229.

But not in favour of a husband (*Moodie v. Reid* (1816), 1 Madd. 516). Is this decision affected by the great alterations in the proprietary relations of husband and wife which have taken place since 1816?

- (g) *Lucena v. Lucena* (1842), 5 Beav. 249.
Morse v. Martin (1865), 34 Beav. 500.

There is, however, some doubt whether a defective exercise in favour of children will be aided at the expense of others in the same position who are not provided for (*Morse v. Martin, ubi supra*). And the Court will not intervene in favour of an illegitimate child (*Bramhall v. Hall* (1764), 2 Eden, 220).

- (h) *A.-G. v. Burdett* (1717), 2 Vern. 755.
Piggot v. Penrice (1717), Gilb. (1 Ch.) 137.
Innes v. Sayer (1849), 7 Ha. 377.

1646. Any exercise of a special power of appointment with an object inconsistent with the intention of the settlor, will, though formally correct, be set aside *in toto* by the Court as a "fraud on the power";^(a) but the rights of purchasers of the legal estate for value *bonâ fide* acquired under the exercise will not be affected.^(b) In other respects, it is usually immaterial that the appointee was not aware of the fraudulent character of the appointment.^(c)

- (a) *Aleyn v. Belchier* (1758), 1 Eden. 132.
Hinchinbrooke v. Seymour (1784), 1 Bro. C.C. 395.
Daubeny v. Cockburn (1816), 1 Mer. 626.
Portland (Duke) v. Topham (Lady) (1864), 11 H.L.Cas. 32.
Re Kirwan's Trusts (1883), 25 Ch. D. 373.
(b) *M'Queen v. Farquhar* (1805), 11 Ves. 467, at p. 478, *per* Lord ELDON, C.
Cloutte v. Storey, [1911] 1 Ch. 18.
(c) *Wellesley (Lady) v. Mornington (Earl)* (1855), 2 K. & J. 143.
Re Marsden's Trust (1859), 28 L.J. (Ch.) 906.
Re Nicholson's Settlement, Molony v. Nicholson, [1939] Ch. 11.

For a statutory exception to this last statement, see § 1653 *post*. Generally speaking, the rules as to "frauds on powers" do not apply to releases (*Re Somes, Smith v. Somes*, [1896] 1 Ch. 250).

1647. Generally speaking, and subject to § 1645 *Survival of ante*, a power of appointment can only be exercised *powers* by the person or persons on whom it is conferred.

- Mansell (Lady) v. Mansell* (1757), Wilm. 36, at p. 50, *per* WILMOT, L.C.
Brassey v. Chalmers (1852), 16 Beav. 223.

But, subject to any contrary expression in the settlement—

- (i) when a power conferred on two or more persons is disclaimed by one of them, the power may be exercised by the other or others, or the survivors or survivor of the others ;

L.P.A., 1925, s. 156.

The Act says "on" such disclaimer ; but, presumably, "on" means "after".

- (ii) when a power is conferred on two or more trustees jointly, the power may be exercised by the survivor or survivors of them for the time being ;

Trustee Act, 1925, s. 18 (1).

- (iii) until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, may exercise any power conferred on, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

Trustee Act, 1925, s. 18 (2).

Apparently, none of the above provisions covers the case of a power conferred upon two or more persons (not being trustees) by name, and the death of one or more of them, without disclaimer. In such a case, the survivors cannot exercise the power (*Montefiore v. Browne* (1858), 7 H.L.Cas. 241). There is, possibly, a distinction where powers are conferred on a class (*Lee v. Vincent* (1584), Cro. Eliz. 26), or where the power is annexed to an estate (*Mansell (Lady) v. Mansell* (1757), Wilm. 36 at p. 48, *per* WILMOT, L.C.).

*Repeated
exercise*

1648. Subject to contrary expressions in the settlement, a power of appointment is not exhausted by the exercise thereof, so long as any property remains which the donee might have originally affected by the exercise of such power ;^(a) and the alienation of an interest to which a power is annexed will not extin-

guish the power.^(b) But the donee of the power cannot, except where he has expressly and lawfully reserved a power of revocation,^(c) exercise the power in derogation from his own previous conveyance or appointment.^(d)

(a) *Bowey v. Smith* (1682), 1 Vern. at p. 85, *per Curiam*.

Hervey v. Hervey (1739), 1 Atk. 561.

(b) *Alexander v. Mills* (1870), 6 Ch. App. 124.

The rule extends to involuntary alienations, e.g. by the bankruptcy of the donee of the power (*Holdsworth v. Goose* (1861), 29 Beav. 111; *Re Master's Settlement, Master v. Master*, [1911] 1 Ch. 21).

(c) *Witham v. Bland* (1674), 3 Swan. 277, n., *per* Lord NOTTINGHAM, C.

Saunders v. Evans (1861), 8 H.L.Cas 721.

(d) *Simpson v. Bathurst* (1869), 5 Ch. App. 193.

1649. Where a special power of appointment is created by a settlement, no limitation in exercise of that power which would have been invalid in the settlement, will be valid in the appointment. *Limits of special powers*

Cook v. Duckenfield (1743), 2 Atk. 562, *per* Lord HARDWICKE, C.

Mosley v. Mosley (1800), 5 Ves. 248, at p. 258, *per* ARDEN, M.R.

Norton v. Norton, [1911] 2 Ch. 27.

Consequently, for example, an appointment which, if it had been made in the settlement, would have violated the Rule against perpetuities, is void (*Norton v. Norton, ubi supra*); though, if the appointment had been an independent instrument, it would not have violated the rule (*post*, Section XV, Title III). But the doctrine must not be pushed too far, e.g. so as to overlook the date of the exercise of the power.

1650. No objection can be taken to the exercise of a (special) power of appointment, on the ground that one or more of the objects of the power is excluded by such exercise from the benefit thereof, or is deprived of all but a nominal, unsubstantial, or illusory share of the fund to be appointed; except in so far as the settlor has declared the amount or share from which no object of the power, or some one or more object or objects of the power, shall not be excluded. *Illusory appointments*

Before the passing of the Illusory Appointments Act, 1830, special powers of appointment were classified, according to the construction put by the Court on the words of the settlor, as "exclusive" (i.e. those in which the donee of the power was at liberty to exclude any of the objects of the power from participation in the property) and "distributive" or "non-exclusive" (i.e. those in which the donee could only decide the proportions in which the objects should take, without excluding any one entirely). In order to prevent an evasion of this distinction, the Court held that, in the case of a non-exclusive power, a substantial share must, if the power was to be well exercised, be given to each object. This rule was modified by the Act of 1830; but the necessity of appointing *some* share to every object of a non-exclusive power remained till the passing of the Powers of Appointment Act of 1874, which was retrospective.

*Default of
appointment*

1651. Where a special power of appointment is accompanied by a gift over of the property in default of appointment, the property vests at once in the person or persons entitled in default of appointment, but subject to divesting in the event of the exercise of the power.^(a) Where there is no provision in default of appointment, a gift of either the capital or the income of the property may, where the general intention of the settlor to benefit the objects of the power is clear,^(b) be implied (even in a settlement by deed) in favour of the objects of the power. But, in such a case, only those persons can take in default of appointment who might have taken under an exercise of the power.^(c)

- (a) *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39.
Lambert v. Thwaites (1866), L.R. 2 Eq. 151.

The consequence is, that the representatives of members of a class, who die before default of appointment, may share in the distribution (*Lambert v. Thwaites, ubi supra*).

- (b) *Richardson v. Harrison* (1885), 16 Q.B.D. 85.
Re Weekes' Settlement, [1897] 1 Ch. 289.
 (c) *Kennedy v. Kingston* (1821), 2 Jac. & W. 431 } (capital).
Walsh v. Wallinger (1830), 2 Russ. & M. 78 }
Re Master's Settlement, Master v. Master, [1911] 1 Ch. 321.

In the two earlier cases, some stress was laid on the fact that the power was "non-exclusive" (*ante*, § 1650, n.). But (*semble*) the

rule was not altered by the passing of the Powers of Appointment Act, 1874. (See, however, *Re Weekes' Settlement*, *ubi supra*, and the language of ROMER, J.) The latter part of the rule, however, where the power is testamentary only, excludes from participating in the property all persons who die in the lifetime of the donee of the power (*Kennedy v. Kingston*, *Walsh v. Wallinger*, *ubi supra*).

1652. Where an appointment, made in exercise of a power, is partly authorized by such power, and partly unauthorized, either because it includes persons not the objects of the power,^(a) or because a condition is annexed to the taking effect of the appointment which is not authorized by the power,^(b) or otherwise, then, if the authorized and the unauthorized parts of the appointment are severable,^(c) the exercise of the power will be effectual as to the authorized part and ineffectual as to the unauthorized.^(d) *Excessive exercise of power*

- (a) In such a case, if the appointor has given, by the same instrument, benefits out of his own property to those objects of the power who benefit by the appointment, such persons will not be allowed to claim both the benefits under the appointment and the benefits out of the appointor's own property, without compensating the persons deprived of their shares in the appointment by reason of the fact that they are not objects of the power ("election"). But no election is raised unless there is really a fund of the appointor's own, out of which compensation can be made (*Bristow v. Warde* (1794), 2 Ves. 336).
- (b) *Alexander v. Alexander* (1755), 2 Ves. Sen. 640, at p. 644, *per* Sir THOMAS CLARKE, M.R.
Stephens v. Gadsden (1855), 20 Beav. 463.
Gerrard v. Butler (1855), 20 Beav. 541.
- (c) This is essential. ROMILLY, M.R., in the case last cited, admits that if "the superadded terms constitute an essential part of the gift itself", the whole appointment will be bad. A good deal will depend on whether the persons intended by the appointor to benefit by the failure of the condition, are objects of the power, or not (*Re Perkins*, *Perkins v. Bagot*, [1893] 1 Ch. 283).
- (d) *Alexander v. Alexander*, *ubi supra*.
Re Perkins, *ubi supra*.
Re Kerr's Trusts (1877), 4 Ch. D. 600.

1653. An instrument purporting to exercise a power of appointment over property which, in default of appointment, is held in trust for a class or *Protection of purchaser*

number of persons of whom the appointee is one will not be void on the ground of fraud on the power (*ante*, § 1646) as against a purchaser in good faith.^(a) But if the interest appointed exceeds, in amount or value, the interest in such property to which, immediately before the execution of the instrument the appointee was presumptively entitled in default of appointment (regard being had to hotchpot (*post* § 2054) and advances made to him) the protection afforded to a purchaser by this provision will be void as to the excess.^(b)

(a) Law of Property Act, 1925, s. 157 (1).

(b) *Ibid.* (2).

"Purchaser in good faith" means a person dealing with an appointee not less than 25 years old for valuable consideration without notice of the fraud or of any circumstances from which, if reasonable enquiries had been made, fraud might have been discovered (*ibid.* (2)) and his successors in title (*ibid.* (a)).

*Powers and
perpetuities*

1654. Powers of appointment and disposition are subject to the Rule against Perpetuities (*post*, Section XV, Title III) in the sense that no such power which may, according to the terms of the instrument creating it, be exercised beyond the period of perpetuity is valid.^(a) But if, by the terms of the instrument creating it, the power must be exercised within the period, but may be exercised in favour of objects falling within the period of perpetuity, and also in favour of other objects, an exercise of the power which disposes of the whole or a definite and ascertainable share of the property in favour of objects wholly within the period of perpetuity, is valid.^(b)

(a) *Norton v. Norton*, [1911] 2 Ch. 27.

Re De Sommers, Coelenbier v. De Sommers, [1912] 2 Ch. 622.

It will be remembered that, in the case of a "special" power this period commences to run from the taking effect of the settlement, not of the exercise of the power. See *Re Legh's Settlement Trusts, Public Trustee v. Legh*, [1938] Ch. 39.

- (b) *Griffith v. Pownall* (1843), 13 Sim. 393.
Re Davies and Kent's Contract, [1910] 2 Ch. 35.
Re Fane, Fane v. Fane, [1913] 1 Ch. 404.

An appointment to a class which comprises objects within and without the period is bad (*Leake v. Robinson* (1817), 2 Mer. 363).

1655. Where under an instrument (testamentary *Age of vesting* or otherwise), executed or taking effect after 1925, the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or a class of beneficiaries, is made to depend only on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this provision would be, rendered void for remoteness,^(a) the instrument will take effect, for the purposes of such gift, gift over, remainder, executory limitation, or trust, as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years; and that age will be substituted for the age stated in the instrument.^(b)

(a) I.e. under the Rule against Perpetuities, *post*, Section XV, Title III.

(b) L.P.A., 1925, s. 163.

SECTION XV INEFFECTUAL ALIENATIONS OF PROPERTY

TITLE I—GENERAL

*Fraudulent
conveyance*

1656. Every conveyance *inter vivos* ^(a) of property, real or personal, corporeal or incorporeal, ^(b) other than a disentailing assurance, made with intent to defraud creditors ^(c) will be voidable at the instance of any person thereby prejudiced; except that it cannot be set aside at the expense of any person who has, *bonâ fide* and for good ^(d) or valuable consideration, acquired an interest in the property conveyed, ^(e) without having, at the time of the conveyance, any notice of the intent to defraud creditors. ^(f)

- (a) The old statute of 1571 (13 Eliz. c. 5) which is the basis of this paragraph, expressly enumerates "feoffment, gift, grant, alienation, bargain, conveyance . . . by writing or otherwise, and all and every bond, suit, judgment, and execution". It is believed, however, that there is no instance of a disclaimer having been held fraudulent under the statute; though a disclaimer might very well be made with direct intent to defeat creditors. Of course a testamentary disposition cannot be a fraudulent disposition in the sense of the statute, because it can only operate after the testator's creditors have been satisfied. And see Law of Property Act, 1925, s. 205 (1) (ii).
- (b) There was at one time a doctrine that a thing in action, which, at the common law, could not be taken in execution, was not within the old statute. But the doctrine is now clearly obsolete (*Stokoe v. Cowan* (1861), 29 Beav. 637; *Edmunds v. Edmunds*, [1904] P. 362). See Law of Property Act, 1925, s. 205 (1) (xx).
- (c) There need not be more than one creditor defrauded (*Edmunds v. Edmunds, ubi supra*).
- (d) This provision, though actually taken from the Act of 1571, incidentally anticipates the famous decision in *Twyne's Case* (1602), 3 Co. Rep. at 81 b, which deliberately glossed "good" as "valuable". The chief result is to protect post-nuptial family settlements. *Quære*: Does the wording of the new Act make a past debt "good" consideration (*Glegg v. Bromley*, [1912] 3 K.B. 474)?
- (e) It was decided on the old Act of 1571, that the purchaser was pro-

tected, though he did not take directly by the fraudulent conveyance; and the interest that he acquires need not be clothed with the legal estate or ownership (*Halifax Joint Stock Banking Co. v. Gledhill*, [1891] 1 Ch. 31).

(f) Law of Property Act, 1925, s. 172.

1657. Any of the following circumstances occurring in connection with a conveyance of property *inter vivos* will, unless satisfactorily explained, raise a presumption that such disposition was made with intent to defraud creditors, viz. :— “Badges of fraud”

(i) that the disposition was of all, or substantially all, the disposer's property ;

(ii) that the disposer continued in possession or control of the property after the disposition ;

This presumption may, of course, be rebutted by showing that the disposition was intended as a *bond fide* mortgage or other security (*Edwards v. Harben* (1788), 2 Term Rep. 587, at p. 595, *per* BULLER, J. ; *Reed v. Wilmot* (1831), 7 Bing. 577).

(iii) that the conveyance was made secretly ;

(iv) that the conveyance was made while the person seeking to impeach the disposition (? any creditor) was attempting to enforce his claim by legal proceedings ;

(v) that there was a trust between the parties for the benefit of the conveying party ;

(vi) that the conveyance, if in writing, contains unusual clauses.

Twyne's Case (1602), 3 Co. Rep. 81 a.

1658. A gratuitous disposition of property *inter vivos* will be deemed fraudulent for the purposes of § 1656, if when it was made the conveying party was either— *Voluntary settlements*

(i) insolvent without the aid of the property comprised in the conveyance ; or

Freeman v. Pope (1870), 5 Ch. App. 538, at p. 545, *per* GIFFARD, L.J.
Re Lane-Fox, Ex parte Gimblett, [1900] 2 Q.B. 508, at p. 513, *per*
 WRIGHT, J.

- (ii) about to enter upon a hazardous business in which he was likely to incur debts which he could not pay without recourse to the property included in the disposition.

Stileman v. Ashdown (1742), 2 Atk. 477, at p. 481, *per* Lord HARDWICKE, C.

Mackay v. Douglas (1872), L.R. 14 Eq. 106.

*Onus of
proof*

1659. In both the cases mentioned in § 1658 *ante*, the facts raise a presumption of intent to defeat creditors.^(a) In other cases, it is necessary for the person seeking to set aside the disposition, either to prove actual intention to defraud, or to raise a presumption of such intention by other means (*ante*, § 1657).^(b)

(a) *Freeman v. Pope* (1870), 5 Ch. App. 538.

Cornish v. Clark (1872), L.R. 14 Eq. 184.

Mackay v. Douglas, ubi supra.

Re Holland, [1902] 2 Ch. 360, at pp. 373, 381.

(b) *Spirett v. Willows* (1865), 3 De G.J. & Sm. 293, as modified by
Freeman v. Pope, ubi supra.

*Subsequent
creditors*

1660. Subject to § 1658, the mere fact that a gratuitous disposition does in fact defeat subsequent creditors, does not entitle such subsequent creditors to set it aside.

Ex parte Mercer (1886), 17 Q.B.D. 290.

Re Lane-Fox, Ex parte Gimblett, [1900] 2 Q.B. 508.

*Illusory
consideration*

1661. For the purposes of §§ 1658 and 1660 *ante*, a gratuitous disposition includes a disposition made for a consideration so inadequate as to be illusory or merely colourable.

Mathews v. Feaver (1786), 1 Cox, Eq. Cas. 278.

Strong v. Strong (1854), 18 Beav. 408.

It has been held that, for the purposes of the 27 Eliz. (1584) c. 4, now repealed by the Law of Property Act, 1925, s. 173, a voluntary conveyance may become a conveyance for value by the giving of

subsequent consideration (*Prodger v. Langham* (1663), 1 Sid. 133). But it is believed that this doctrine has never been applied to the statute of 1571.

1662. Any creditor as against whom any disposition is void under § 1656 *ante*,^(a) or the trustee in bankruptcy of the conveying party,^(b) is entitled to bring an action against the holders of the property comprised in it, to compel such holders to make the property applicable for the payment of the conveying party's debts. And the property, when recovered, will not only be applicable for payment of all creditors who would have been entitled to bring actions to set aside the disposition, but will be applicable for payment of all the conveying party's debts *pro rata*.^(c)

*Remedy of
creditors*

- (a) *Reese River Silver Mining Co. v. Atwell* (1869), L.R. 7 Eq. 347. (It is not necessary that the creditor suing should have obtained a judgment or charge on the property (*ibid.*).)

Ideal Bedding Co., Ltd. v. Holland, [1907] 2 Ch. 157.

The holder of a judgment or execution need not, however, sue on behalf of creditors generally (*Blenkinsopp v. Blenkinsopp* (1850), 12 Beav. 568; *Smith v. Hurst* (1852), 10 Hare, 30). Apparently these cases are not overruled by *Reese River Silver Mining Co. v. Atwell*, *ubi supra*.

- (b) *Doe d. Grimsby v. Ball* (1843), 11 M. & W. 531. The bankruptcy jurisdiction is the proper tribunal for the purpose (*Re Harrison* (1880), 14 Ch. D. 265).
- (c) *Taylor v. Jones* (1743), 2 Atk. 600.
Richardson v. Smallwood (1822), Jac. 552.
Strong v. Strong (1854), 18 Beav. 408.
Jenkyn v. Vaughan (1856), 3 Drew. 419.

1663. If there is in existence any creditor by whom a conveyance is voidable under § 1656 *ante*, and such creditor refuses to take steps to set aside the conveyance, any other creditor of the conveying party may do so; notwithstanding the fact that the conveyance is not, *primâ facie*, voidable against such other creditor.

*Subrogation
of creditors
rights*

Jenkyn v. Vaughan, ubi supra.

Freeman v. Pope (1869), L.R. 9 Eq. 206.

Crossley v. Elsworth (1871), L.R. 12 Eq. 158.

*Dispositions
valid be-
tween parties*

1664. Subject to the right of creditors to set it aside as voidable against themselves under § 1656 *ante*, the conveyance in question will, unless otherwise invalid, be effectual between the parties to it, and other persons not being creditors of the conveying party.

Blenkinsopp v. Blenkinsopp (1850), 12 Beav. 568.

Tarleton v. Liddell (1851), 17 Q.B. 390.

Ideal Bedding Co., Ltd. v. Holland, [1907] 2 Ch. 157.

And, therefore, if there is any possibility of a surplus after paying all creditors, the Court will not direct the conveyance to be cancelled, but merely order the holders of the property to concur in all acts necessary for making the property applicable for payment of the creditors (*Ideal Bedding Co., Ltd. v. Holland*, *ubi supra*).

*Purchaser
without
notice*

1665. Whether a purchaser who claims under a fraudulent conveyance as a *bonâ fide* purchaser for valuable or good consideration is affected with notice of the fraud, for the purposes of § 1656 *ante*, is a question of fact in each case.

Copis v. Middleton (1818), 2 Madd. 410.

In this important case, PLUMER, V.C., laid it down that neither (i) the conveying party's insolvency, nor (ii) the fact that he and the purchaser were near relations, nor (iii) evidence of inadequacy of price, nor (iv) failure of the purchaser to investigate the title, were of themselves sufficient to affect the purchaser with notice of the fraud. It has elsewhere been laid down that neither (i) knowledge by the purchaser that the conveying party was in failing circumstances (*Re Gillo, Ex parte Dollar* (1891), 8 Morr. 157), nor (ii) knowledge that the effect of the purchase might be to defeat a particular creditor (*Holbird v. Anderson* (1793), 5 Term Rep. 235) or even creditors generally (*Re Cranston, Ex parte Cranston* (1892), 9 Morr. at p. 167; *Glegg v. Bromley*, [1912] 3 K.B. 474), will necessarily affect the purchaser with notice of the fraud.

*Lapse of
time*

1666. *Semble*: a creditor who has been defrauded, or is deemed to have been defrauded, by a conveyance of property, is not barred by any lapse of time from taking proceedings to avoid the disposition; so long as his debt is personally recoverable against the disposer. And the mere fact of delay, even un-

explained, in enforcing his rights, will not deprive him of his remedy under the statute.

Re Maddever, Three Towns Banking Co. v. Maddever (1884), 27 Ch. D. 523.

About the second part of the above paragraph there can be no doubt; for the creditor's right is legal, not equitable. But, on principle, the period of limitation should run from the making of the disposition, not from the incurring of the debt. In *Re Maddever, ubi supra*, the creditor slept on his rights for ten years; but his claim, being by specialty, was not barred.

1667. No acquisition, made in good faith, without fraud or unfair dealing, of any reversionary interest in property (including an expectancy or possibility) for money or money's worth, will be liable to be opened or set aside merely on the ground of under value.^(a) But this provision does not affect the jurisdiction of the Court to set aside or modify unconscionable bargains.^(b) *Sales of
reversions*

(a) Law of Property Act, 1925, s. 174 (1).

(b) *Ibid.* (2).

It should be noted that most of the decisions referred to in this Title were delivered in cases arising under the old Act of 1571. But there appears to be no reason to doubt that they would be followed in cases arising after 1925, except in so far as the Law of Property Act of that year changes the law, e.g. in the matter of "good" consideration. For "unconscionable bargains" see *ante*, § 193.

- (d) The fact that the bare legal interest remains in the settlor, is immaterial (*Skrager v. March*, [1908] A.C. 402, P.C.), e.g. he can satisfy the requirements of the Act by declaring himself a trustee of the property.
- (e) Or to the beneficiaries direct (*Re Lowndes, Ex parte Trustee, ubi supra*).
- (f) Bankruptcy Act, 1914, s. 42 (1).

Of course, cases which fall within this provision are frequently also within the terms of the Act of 1571 (*ante*, § 1656); and the settlor's trustee in bankruptcy has then the option of proceeding under either statute. But it may be useful to point out, that s. 42 of the Bankruptcy Act is wider than the old statute of Elizabeth and s. 172 of the Law of Property Act, 1925, which has replaced it, in that (i) it requires no proof of fraud, express or implied, (ii) it throws the *onus* of proof (even after two years) on the person upholding the settlement, (iii) it draws no distinction between "existing" and "subsequent" creditors. On the other hand, it is narrower than the statute of Elizabeth and the Law of Property Act (i) by reason of its time limits, (ii) because proof of solvency after the execution of the settlement is a complete answer after the lapse of two years, (iii) because it only applies to dispositions of property intended to be retained by the donees.

*Definition of
"voluntary
settlement"*

1671. A settlement, for the purposes of § 1670 *ante*, means any conveyance or transfer of property^(a) which is intended to be retained and preserved as the property of the transferee,^(b) not being a conveyance or transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration,^(c) or a conveyance or transfer made to or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife.^(d)

- (a) Bankruptcy Act, 1914, s. 42 (4).

This provision, apparently, applies also to the executory settlements described in the following paragraph.

- (b) *Re Tankard, Ex parte Official Receiver*, [1899] 2 Q.B. 57.
Re Plummer, [1900] 2 Q.B. 790.

I.e. a gift intended to be spent or consumed at once by the donee, or at his free disposal, is not a "settlement" for this purpose (*Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682).

- (c) Where the purchaser gives a consideration which manifestly applies

only to part of the property transferred, the transfer will be valid as to that part, and invalid as to the rest (*Sturmeys Trustee v. Sturmeys* (1912), 107 L.T. 718).

- (d) Bankruptcy Act, 1914, s. 42 (1). (Property which a husband takes beneficially as his wife's administrator comes to him "in right of his wife" for this purpose (*Re Bower Williams, Ex parte Trustee*, [1927] 1 Ch. 441).)

1672. Any covenant or contract made by any *Executory settlements* person, in consideration of his or her marriage, for the future payment of money for the benefit of, or for the future settlement of property wherein, at the date of the marriage, the settlor had no interest, on, the settlor's wife, husband, or children, will, if such money or property is not in right of the settlor's wife or husband, be void, in the event of the settlor being adjudged bankrupt, against his trustee in bankruptcy, in so far as such covenant or contract has not been executed at the date of the commencement of the settlor's bankruptcy.

Bankruptcy Act, 1914, s. 42 (2).

The persons claiming under the covenant or contract will be able to rank for dividend in the bankruptcy; but only after claims of other creditors for valuable consideration have been satisfied. And any payment of money (other than premiums on a life policy), or transfer of property, made by the settlor in pursuance of the covenant or contract, will be void; unless the persons receiving it can prove either (i) that such payment or transfer was made two years before the commencement of the bankruptcy, or (ii) that it left the settlor solvent, or (iii) that it was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a named person, and was in fact paid or made within three months after the money or property came under the control of the settlor (*ibid.*).

1673. A male minor of twenty years of age or *Minors* more and a female minor of seventeen years of age or more may make on the occasion or in contemplation of his or her marriage,^(a) with the approval of the Court, a valid and binding settlement of his or her property. But such a settlement may not include an

it is proved that the company immediately after the creation of the charge was solvent, be invalid, except as to the amount of cash actually paid ^(a) to the company in consideration for the charge, and interest at five *per cent.* per annum.^(b)

(a) *Re Matthew Ellis, Ltd.*, [1933] Ch. 458.

Re Destone Fabrics, Ltd., [1941] Ch. 319.

(b) Companies Act, 1929, s. 266.

TITLE III—UNDER THE RULE AGAINST PERPETUITIES

1679. Subject to §§ 1681–1685 *post*, any limitation by virtue of which any interest in any property may possibly arise or be transferred more than twenty-one years after the expiry of a life or lives in being ^(a) at the making of such limitation, ^(b) is wholly void ; ^(c) and all limitations in the same conveyance subsequent to and dependent upon such limitation are also void. ^(d) For the purposes of this rule, a person *en ventre sa mère* is deemed to be born, whether he takes an interest under such limitation, or not. ^(e)

*Rule against
Perpetuities*

- (a) The persons whose lives are chosen for this purpose need not take any interest under the limitation. But they must be ascertainable (*Re Moore, Prior v. Moore*, [1901] 1 Ch. 936).
- (b) The rule (*ante*, § 1649), that the exercise of a special power of appointment will be deemed to date from the settlement creating it, applies for the purposes of this calculation (*Re Thompson, Thompson v. Thompson*, [1906] 2 Ch. 199; *Norton v. Norton*, [1911] 2 Ch. 27).
- (c) *Caddell v. Palmer* (1833), 1 Cl. & Fin. 372.
Re Stratheden and Campbell (Lord), [1894] 3 Ch. 265.
- (d) *Beard v. Westcott* (1822), 5 B. & Ald. 801.
Monypenny v. Dering (1852), 2 De G.M. & G. 145.
Re Canning's Will Trusts, Skues v. Lyon, [1936] Ch. 309.
Re Coleman, Public Trustee v. Coleman, [1936] Ch. 528.
- (e) *Long v. Blackall* (1797), 7 Term Rep. 100.
Re Wilmer's Trusts, Moore v. Wingfield, [1903] 2 Ch. 411.
Villar v. Gilbey, [1907] A.C. 139, at pp. 144, 149. (But see *Elliot v. Joicey*, [1935] A.C. 209.)

It will be noted that the suspension for gestation may occur, not only at the beginning or end of the period, but during its currency, e.g. to X for life, and afterwards to such of his children as shall attain 21. Here a posthumous child of X can take on attaining 21.

The Rule against Perpetuities, now so strictly applied by the Courts, was (substantially) invented by the judges to restrain the executory interests which grew up after the Statute of Uses (*ante*, § 1269, Note). The older forms of future interests in land, viz. legal remainders, were considered, until lately, to be sufficiently restrained by the rule that a contingent remainder “failed”, unless

it was ready to take effect on the expiry of the "particular" estate immediately preceding it. But executory limitations were (except in rare cases) indestructible by similar events; and, after considerable hesitation, the Courts adopted, with regard to them, the rule in the text, which is usually considered to have received its final shape in the case of *Caddell v. Palmer*, *ubi supra*. The rule is said (e.g. by Lord KENYON in *Long v. Blackall*, *ubi supra*) to have been modelled on the practice of strict settlements, by which estates tail were limited, after the life estate of the husband, to the unborn children of the marriage, and under which the youngest child must obviously have attained 21 within a few months after 21 years from his father's death, and so have been able to bar the entail. But it is obvious that the Rule against Perpetuities, in its final form, is a good deal less strict than the practice of strict settlements; inasmuch as it allows the "life or lives in being" to be arbitrarily chosen. It is said by Mr. Gray (*op. cit.* § 178) that *Lloyd v. Carew* (1697), Pre. Ch. 72, was the first reported decision which allowed this.

*Limitations
to which the
Rule applies*

1680. In particular, the Rule against Perpetuities applies to the following limitations, viz. :—

(i) executory interests ;

Caddell v. Palmer, *ubi supra*.

Re Stratheden and Campbell (Lord), *Alt. v. Stratheden and Campbell* (Lord), *ubi supra*.

(ii) equitable contingent remainders ;

Abbiss v. Burney, *Re Finch* (1880), 17 Ch. D. 211.

Of course there are now no legal contingent (or other) remainders. (Law of Property Act, 1925, s. 1 (1) (3).)

(iii) covenants to convey ;

L. & S.W. Rly. Co. v. Gomm (1882), 20 Ch. D. 562.

Probably, the covenant could be enforced by a purely personal action for damages ; but not by a decree for specific performance.

(iv) options to purchase ;

Worthing Corpn. v. Heather, [1906] 2 Ch. 532.

Here again, the personal remedy is, probably, open to the person having the option.

(v) common law conditions (*ante*, § 1324) ;

Re Hollis' Hospital Trustees and Hague's Contract, [1899] 2 Ch. 540.

Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter, [1912] 1 Ch. 337.

- (vi) restraints on anticipation where these are lawful (subject to § 1684 *post*) ;

Re Game, Game v. Tennent, [1907] 1 Ch. 276.

- (vii) creation of trusts for accumulation ;

Browne v. Stoughton (1846), 14 Sim. 369, recognized as law in *Re Stamford and Warrington (Earl)*, *Payne v. Grey*, [1912] 1 Ch. 343, at p. 353.

Of course the *duration* of trusts for accumulation is still more severely restricted (*post*, §§ 1686–1690). Here it is the commencement of the trust which is restricted.

- (viii) creation of charges *in futuro* ;

Edwards v. Edwards, [1909] A.C. 275.

It has been held by the Court of Appeal in Ireland, virtually overruling the earlier case of *Switzer & Co. v. Rochford*, [1906] 1 I. R. 399, that provisions for the extinguishment of charges are also within the rule (*Re Tyrrell's Estate*, [1907] 1 I. R. 292 ; followed in *Re Donoughmore's Estate*, [1911] 1 I. R. 211). There seems to be no doubt that *Re Tyrrell's Estate* is right on principle ; inasmuch as the extinguishment of a charge must operate to confer a new interest on someone else. But there seems to be no decision on the point in England.

- (ix) creation of future easements ;

Sharpe v. Durrant (1911), 55 Sol. Jo. 423.

- (x) powers of appointment (see Section XIV, *ante*) ;

- (xi) rights of entry in regard to an estate in fee simple (not being a rent charge held for a legal estate) ;

Law of Property Act, 1925, s. 4 (3).

- (xii) terms (whether at rents or granted in consideration of fines) limited after 1925 to take effect more than twenty-one years from the dates of the instruments creating them.

Law of Property Act, 1925, s. 149 (3).

Any contract to grant such a term is void if made after 1925 ; but certain settlement terms are excepted from the rule (*ibid.*).

*Limitations
to which the
Rule does not
apply*

1681. The Rule against Perpetuities does not apply to—

- (i) mere personal covenants, even though the benefit of them is acquired by successive purchasers of land ;

South Eastern Railway Co. v. Associated Portland Cement Manufacturers (1900), *Ltd.*, [1910] 1 Ch. 12.

- (ii) rights of re-entry in leases ;

Re Tyrrell's Estate, [1907] 1 I.R. 292.

This seems to be clearly recognized by implication by s. 11 (2) of the Conveyancing Act, 1882, now repealed ; and it is explained by Mr. Gray (*op. cit.* p. 303), on the ground that such right of re-entry is annexed to the reversion.

- (iii) powers to distrain or to take possession of land or the income thereof given by way of indemnity against a rent ;

Law of Property Act, 1925, s. 162 (1) (a).

- (iv) rent charges created only as indemnities against other rent charges, even though such first-mentioned rent charges may only arise or become payable on breach of a condition or stipulation ;

Law of Property Act, 1925, s. 162 (1) (b).

- (v) powers, whether exercisable on such breach or not, to retain or withhold payment of any instalment of a rent charge as indemnity against another rent charge ;

Law of Property Act, 1925, s. 162 (1) (c).

- (vi) powers conferred by the Law of Property Act, 1925, s. 121, of entry, distress, and receipt of rents and profits of land on the holders of rent charges ;

Law of Property Act, 1925, s. 121 (6).

- (vii) trusts for payment of debts ;

Re Stamford and Warrington (Earl), *Payne v. Grey*, [1912] 1 Ch. 343.

(viii) contracts for renewal in leases ;

• *Hare v. Burges* (1857), 4 K. & J. 45.

Re Tyrrell's Estate, [1907] 1 I. R. 194, at p. 197, *per* Ross, J.

* Any covenant entered into after 1925 for the renewal of a lease for a term exceeding sixty years, is void (Law of Property Act, 1922, s. 145 and Sched. XV para. 7 (2)) ; and a term to take effect more than twenty-one years from the date of the instrument creating it is also void, as is a contract to create the same (Law of Property Act, 1925, s. 149 (3)).

(ix) rights of entry for mining, cutting timber, executing repairs and sanitary work ;

Law of Property Act, 1925, s. 162 (1) (d).

This a brief paraphrase of a long subsection, which should be referred to by those interested.

(x) rent charged in perpetuity held for a legal estate ;

Law of Property Act, 1925, s. 4 (3).

(xi) limitations for charitable purposes, following upon the failure of previous charitable limitations of the same property.

Christ's Hospital v. Grainger (1849), 1 Mac. & G. 460.

Re Tyler, [1891] 3 Ch. 252.

The first limitation to a charity must clearly observe the rule (*Re Bowen*, [1893] 2 Ch. 491 ; *Re Stratheden and Campbell (Lord)*, *Alt. v. Stratheden and Campbell (Lord)*, [1894] 3 Ch. 265).

(xii) mortgages ;

Knightsbridge Estates Trust, Ltd. v. Byrne, [1940] A.C. 613.

1682. The fact that a power of appointment con- templates persons outside the rule does not make the power void if it could be, in accordance with the terms of the settlement, and in fact is, exercised wholly in favour of persons within it. *Powers of appointment*

Griffith v. Pownall (1843), 13 Sim. 393.

Re Bowles, Page v. Page, [1905] 1 Ch. 371.

Re Davies and Kent's Contract, [1910] 2 Ch. 35.

Of course, if the power is exercised in favour of a class some

of whom do, and some do not, violate the rule, the whole appointment is bad (*Re Game, Game v. Tennent*, [1907] 1 Ch. at p. 280, *per* WARRINGTON, J.).

*Limitations
after entailed
interests*

1683. A limitation to take effect on the expiry of an entailed interest is not on that account void for perpetuity;^(a) and a limitation which, if it stood alone, would not be too remote, is not void merely because it is to take effect at some period after the expiry of an entailed interest.^(b)

(a) *Faulkener v. Daniel* (1843), 3 Hare, 199.

Heaseman v. Pearse (1871), 7 Ch. App. 275.

(b) *Re Haygarth, Wickham v. Holmes*, [1912] 1 Ch. 510.

The reason is, that an entailed interest may always be barred, and all limitations after it thus destroyed (*ante*, § 1231); and so the property is not made inalienable.

*Directions
to settle and
restraints on
anticipation*

1684. When a direction to settle,^(a) or a restraint on anticipation,^(b) is imposed upon a gift to the members of a class, and some of them are born at such a time as would make the direction, if carried out, valid, and some are not, the direction or restraint will, if valid at all, be valid as to those who are so born, and invalid as to those who are not.

(a) *Re Russell, Dorrell v. Dorrell*, [1895] 2 Ch. 698.

(b) *Re Game, Game v. Tennent*, [1907] 1 Ch. 276.

Of course, valid restraints on anticipation are likely to become increasingly rare (Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2).

*"Mere
machinery"*

1685. Where there is a limitation which does not contravene the Rule against Perpetuities, but the mode of carrying it out prescribed by the settlor or the parties would, if followed, do so, the mode may be regarded as surplusage, and the limitation will be good.

Re Daveron, Bowen v. Churchill, [1893] 3 Ch. 421.

Re Appleby, Walker v. Lever, [1903] 1 Ch. 565.

Re Coulson's Trusts, Prichard v. Coulson (1907), 97 L.T. 754.

TITLE IV—UNDER THE RULES AGAINST ACCUMULATION

1686. Even though it does not violate the Rule *Rule against accumulation.* against Perpetuities, any limitation which directs accumulation, whole or partial, of the rents, issues produce, or profits of any property beyond one of the four alternative periods following is (subject to §§ 1688, 1689 *post*) void for the excess,^(a) viz. :—

- (i) the life of the grantor or settlor ; *or*
- (ii) twenty-one years from the death of the grantor or settlor ; *or*
- (iii) the minority or respective minorities of any person or persons who may be living or *en ventre sa mère* at the death of the grantor, settlor or testator ; *or*,
- (iv) the minority or respective minorities only of any person or persons who, under the limitations of the settlement would, for the time being, if of full age, be entitled to the income directed to be accumulated.^(b)

(a) *Griffiths v. Vere* (1803), 9 Ves. 127.

Re Watt's Will Trusts, Watt v. Watt, [1936] 2 All. E.R. 1555.

(b) Law of Property Act, 1925, s. 164 (1).

Re Cattell, Cattell v. Cattell, [1914] 1 Ch. 177. (This case shows that the minorities in question need not begin till long after the settlement takes effect.)

The old Accumulations Act, of 1800, was the direct outcome of the famous case of *Thellusson v. Woodford* (1798), 4 Ves. 227 ; *on appeal* (1805), 11 Ves. 112, in which the Court of Chancery, and, on appeal, the House of Lords, felt themselves bound to uphold the provisions of the will of Mr. Peter Thellusson, who directed the income of a large fortune (amounting to more than half a million sterling) to be accumulated during the whole of the period allowed by the Rule against Perpetuities (*ante*, Title III), for the benefit of the

persons ultimately entitled to the capital. The Act of 1800 did not affect to be retrospective ; but some modification of Mr. Thellusson's will was eventually made by private Act of Parliament (3 & 4 Will. IV (1833) c. 27). It is, perhaps, worth pointing out, that a direction to accumulate during any part of the interest of an absolute owner in fee, for his ultimate benefit, would be void, as attempting to fetter the disposition of a fee (*Re Trevanion, Trevanion v. Lennox*, [1910] 2 Ch. 538).

*Undisposed
of surplus*

1687. In so far as such direction as is described in § 1686 is void, the rents, issues, produce, or profits which it directs to be accumulated will belong to the person or persons who would have been entitled thereto if such accumulation had not been directed.

Law of Property Act, 1925, s. 164 (1).

This provision, as Lord ELDON pointed out in *Griffiths v. Vere, ubi supra*, at p. 136, a case decided on the old Act of 1800, is by no means easy to interpret. But it seems now to be settled, that the surplus income goes, not to the persons who would have enjoyed the capital of the property save for the direction, but as undisposed of by the settlement (*Re Perkins, Brown v. Perkins* (1909), 101 L.T. 345 ; *Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132).

*Exceptions
from rule*

1688. The provisions of § 1686 have no application to any provision for :—

- (i) payment of debts of any grantor, settlor, testator, or other person ;
- (ii) the raising of portions for children or remoter issue of the grantor, settlor, or testator, or of any person taking any interest under the settlement, or to whom any interest is thereby limited ;
- (iii) the produce of timber or wood.

Law of Property Act, 1925, s. 164 (2).

The section does not say that the timber or wood must be on land comprised in the settlement.

- (iv) the maintenance of property at its present value.

Re Gardiner, Gardiner v. Smith, [1901] 1 Ch. 697.

1689. When any accumulation of surplus income during a minority is made under any statutory power or the general law, the period for which it is made is not taken into account for the purposes of § 1686. *Qualificati*

Law of Property Act, 1925, s. 165.

1690. It has not been lawful for any person, since 27th June, 1892, to make any disposition of any property, in such a manner that the income shall be accumulated, wholly or partially, for the purchase of land only, for any longer period than the minority or respective minorities of any person or persons who, if of full age, would, for the time being, be entitled under the disposition to such income. *Accumulation for investment in land*

Law of Property Act, 1925, s. 166 (1).

The very curious wording of this section leaves the effect of disobedience to its provisions in a doubtful state. No penalty or alternative is prescribed. It is not even said that a disposition contrary to the terms of the statute will be invalid; though, presumably, this would be the case (*Re Danson, Danson v. Bell* (1895), 11 T.L.R. 455. The section does not apply to accumulations to be held as capital money under the Settled Land Acts (*ibid.* (2))).

TITLE V—RESTRAINT ON ALIENATION

Restraints on Alienation **1691.** Any absolute prohibition of alienation attached to a transfer or creation of an absolute vested interest in fee simple or fee tail, or to the ownership of personal property (other than leasehold interests, as to which see § 1081), is void ^(a) but a contingent interest may be made inalienable.^(b)

(a) *Bradley v. Peixoto* (1797), 3 Ves. 324.

Corbett v. Corbett (1888), 14 P.D. 7.

Re Dugdale, Dugdale v. Dugdale (1888), 38 Ch. D. 176.

(b) *Churchill v. Marks* (1844), 1 Coll. 441.

Re Porter, Coulson v. Capper, [1892] 3 Ch. 481.

Forfeiture on bankruptcy **1692.** A provision in a similar transaction for the divesting of the acquirer's vested interest, in the event of his bankruptcy, is also void.

Brandon v. Robinson (1811), 18 Ves. 429.

Re Machu (1882), 21 Ch. D. 838.

Termination on alienation **1693.** A provision for the termination of a life interest, or a leasehold interest, on alienation or bankruptcy, is valid, if it does not transgress the Rule against Perpetuities (*ante*, Book III, Section XV, Title III).

Baker v. Newton (1839), 2 Beav. 112.

Power v. Hayne (1869), L.R. 8 Eq. 262.

Blackman v. Fysh, [1892] 3 Ch. 209.

This and the two following paragraphs refer only to beneficial interests, and do not apply to the fiduciary powers of alienation and management conferred upon limited owners by the Settled Land Act and similar statutes. Any attempt to restrict the exercise of these powers is usually void.

Limitation until alienation **1694.** A limitation of a life interest *until* alienation or bankruptcy (not being a limitation by a person of an interest in his own property until his own bankruptcy ^(a)) is valid.^(b) It is doubtful whether a limita-

tion of a fee simple until alienation ^(c) or bankruptcy ^(d) would now be held valid.

- (a) *Higinbotham v. Holme* (1812), 19 Ves. 88. (But a limitation by a man of his own property, to go over on alienation, cannot be defeated by a single creditor (*Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585).)
- (b) *Brandon v. Robinson* (1811), 18 Ves. 429; approved in *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176.
Dean v. Dean, [1891] 3 Ch. 150.
- (c) *Re Machu* (1882), 21 Ch. D. 838.
Re Dugdale, Dugdale v. Dugdale, ubi supra.
- (d) *Re Johnson Johnson, Ex parte Matthees and Wilkinson*, [1904] 1 K.B. 134.
Re Leach, [1912] 2 Ch. 422.

1695. A qualified restriction against alienation of an interest specified in § 1691 is valid, if it does not transgress the Rule against Perpetuities (*ante*, Book III, Section XV, Title III). *Partial restraints*

Re Macleay (1875), L.R. 20 Eq. 186.

This decision was, however, very severely criticised by Pearson, J., in *Re Rosher, Rosher v. Rosher* (1884), 26 Ch. D. 801. The result of the two decisions appears to be, that the restriction may take the form of prohibiting alienation beyond the limits of a particular class, but not of prohibiting alienation altogether for a limited time. A conveyance of an estate in land for charitable purposes may (probably) provide that, if the estate is not employed for the charitable purpose, it shall revert to the donor or his heirs (*Re Hollis' Hospital Trustees and Hague's Contract*, [1899] 2 Ch. 540). But such a provision would be invalid if it violated the Rule against Perpetuities.

1696. A limitation for the benefit of a married woman made before 1936 might have provided that she should, during the existence of her marriage, have no power to alienate the *corpus*, or anticipate the income, of the property; and such a provision will (subject to §§ 1697–1700) prevent all alienation, direct or indirect, by the married woman.^(a) Such a provision will, however, if executed (or deemed to have been executed) after 1935, be void.^(b) *Restraint on anticipation*

- (a) *Tullett v. Armstrong* (1838), 1 Beav. 1. (It is not necessary that the woman should be married when the gift takes effect; but the restraint will not operate until marriage.)

Hood Barrs v. Cathcart, [1894] 2 Q.B. 559. (The decision on this point is not affected by the appeal in *Hood Barrs v. Heriot*, [1896] A.C. 174.)

(b) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2 (2).

A restraint on anticipation imposed after that date in pursuance of an obligation entered into before it, will be deemed to have been executed before it; but the will of any testator who dies after 1945 will be deemed to have been executed after it (*ibid.* s. 3 (a) (a)).

*Revival on
re-marriage*

1697. Such a provision will cease to operate on the termination of a marriage; but, if suitably worded, it will revive, unless the property has in the meantime been alienated, on any subsequent marriage of the same woman.

Hawkes v. Hubback (1870), L.R. 11 Eq. 5.

Shafto v. Butler (1871), 40 L.J. (Ch.) 308.

*Setting aside
restraint*

1698. A restraint on anticipation may, with the consent of the married woman, be set aside by the Court, to such an extent as is necessary to bind her interest in a transaction which the Court deems to be for her benefit.

Law of Property Act, 1925, s. 169.

*Liability for
costs and
indemnity*

1699. Notwithstanding any restraint on anticipation, the Court may order the costs incurred by the opposite party, in litigation initiated by or on behalf of a married woman, to be paid out of her property;^(a) and may also hold her property liable to indemnify a trustee who, at her instigation or request, or with her consent in writing, has committed a breach of trust in respect of the estate of which the property in question forms part.^(b)

(a) Married Women's Property Act, 1893, s. 2.

Hood Barrs v. Heriot, [1897] A.C. 177.

(b) Trustee Act, 1925, s. 62 (1). The Act is retrospective.

*Liability in
bankruptcy*

1700. When a married woman has been made bankrupt, the Court may, on the application of the trustee in bankruptcy, order the payment, for any time, of the whole or part of any income which she

is restrained from anticipating, to such trustee, for distribution amongst her creditors.

Bankruptcy Act, 1914, s. 52.

It will be remembered, of course, that a married woman may now be made bankrupt in the same way as a man or an unmarried woman, except as to contracts entered into before August 2, 1935 (Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1. *Re A Debtor, Ex parte Debtor* (No. 490 of 1935), [1936] Ch. 237 ; *Re A Debtor* (No. 21 of 1937), [1938] Ch. 694).

SECTION XVI .

CO-OWNERSHIP

TITLE I—GENERAL

Definition

1701. Co-ownership includes every kind of ownership by two or more persons which involves the undivided enjoyment of property, and, in the case of the co-ownership of a present interest, in so far as such interest is capable of possession, undivided possession. The forms of co-ownership recognized by English law are (i) joint ownership, (ii) ownership in common, and (iii) in the case of real estate only, co-parcenary.^(a) Owners of successive interests in the same land are not, as such, co-owners.^(b)

(a) Notwithstanding s. 34 (1) of the Law of Property Act, 1925, it seems possible that a temporary co-parcenary of entailed interests in land is possible (Administration of Estates Act, 1925, s. 45 (2)). But it is conceived that a devise to "heirs", under s. 132 (1) of the Law of Property Act, 1925, would create a joint interest, if, in fact, there were co-heiresses who took as devisees.

(b) *Baring v. Nash* (1813), 1, Ves. & B. 551.

It may be noted that the assignee of any right comprised in a copyright has, as respects the right assigned, and the assignor has, as respects the rights not assigned, the same rights as an ordinary owner of the copyright (*ante*, §§ 1614, 1615). (Copyright Act, 1911, s. 5 (3).) *Quaere* : Is this co-ownership ?

Not in land

1702. An undivided share in land cannot be created ^(a) except in manner provided by the Settled Land Act, 1925.^(b)

(a) Law of Property Act, 1925, s. 34 (1).

(b) I.e. by way of trust for sale and division of the proceeds (Settled Land Act, 1925, s. 36 (4)).

There are elaborate provisions in Sched. I, Part IV, of the L.P.A., 1925, for getting rid of undivided shares in land which were subsisting when the Act took effect. The Act (s. 1 (6)) provides that

a *legal estate* is not capable of subsisting or being created in an undivided share of land. Does this add anything to the scope of s. 34 (1)?

1703. The powers of co-owners of chattels corporeal to bring actions for injury to their respective rights, against one another and strangers, are specified in §§ 744 and 865 *ante*; and the owners of co-contractors, in respect of the co-ownership of choses in action arising out of contract, in §§ 174–178 *ante*. *Powers of co-owners*

1704. Subject to § 1705 *post*, and to any agreement, express or implied, every co-owner is entitled to an account of the profits of the common property, with a view of obtaining his proper share. *Account of profits*

Thornley v. Thornley, [1893] 2 Ch. 229 } (joint owners).
Dunbar v. Dunbar, [1909] 2 Ch. 639 }
Baxter v. Hozier (1839), 5 Bing. (N.C.) 288 (owners in common).

The old action of Account at common law involved the appointment of auditors, and was highly technical. Accounts are now taken before the Master in Chambers or the Official Referee of the Court.

1705. Where, after the 31st December, 1907, a patent has been granted to two or more persons jointly, they are, unless (it is) otherwise specified in the patent, to be treated, for the purpose of the devolution of the legal interest therein, as joint owners (*post*, Title II). But, subject to any contract to the contrary, each of such persons is entitled to use the invention for his own profit without accounting to the others, but not to grant a license without their consent; and, on the death of any such person, his beneficial interest devolves on his personal representative as part of his personal estate. *Joint patentees*

Patents and Designs Act, 1907, s. 37.

The rule that one co-owner of a patent need not account to the other or others was laid down in *Steers v. Rogers*, [1893] A.C. 232. By the Patents and Designs Act, 1932, s. 7, amending

TITLE II—JOINT OWNERSHIP

How created **1710.** Subject to the rule that there cannot be an undivided share in a legal estate in land (*ante*, § 1702), any conveyance or transfer of property to two or more persons, without words of severance, will (subject to §§ 1713–1715 *post*) create a joint ownership in such persons. The interests of all joint owners must be of the same extent and duration.

Litt. s. 277 (land).

Cock v. Burrish (1686), 1 Vern. 425

Shore (Lady) v. Billingsly (1687), *ibid.* 482 } (chattels).

Morley v. Bird (1798), 3 Ves. 628.

Joint owners are said to have four unities, viz. (i) interest, (ii) title, (iii) time, and (iv) possession. But, after the passing of the Statute of Uses (1535), it was possible, by means of future uses, to make the interests of joint tenants of land vest at different times, so long as the seisin out of which they arise was conferred *uno ictu*; e.g. by a limitation to the use of all the children of A, born and to be born (*Stratton v. Best* (1787), 2 Bro. C.C. 233). There seems to be no doubt that a limitation to a similar effect could now be created by way of trust; but the interests created would be equitable only (Law of Property Act, 1925, s. 4 (1)).

Joint entails **1711.** Subject to the rule that there cannot be an undivided share in a legal estate in land,^(a) a conveyance to two persons who cannot possibly intermarry, or to three or more persons, and the heirs of their bodies,^(b) will make such persons joint tenants for life, with remainder to them as tenants in common in tail of equal shares.^(c) But a similar conveyance to two persons who might possibly intermarry, will make such persons tenants in tail special (*ante*, § 1229).^(d)

(a) Law of Property Act, 1925, s. 1 (6).

(b) Presumably the same effect would be produced by the use of the modern form "in tail".

(c) Litt. ss. 283, 284.

Co. Litt. 184 a.

It is said by Coke (Co. Litt. 182 b) that neither can convey away his remainder during his life. But the case quoted in Coke's learned editor, Butler (viz. *Huntley's Case* (1574), 3 Dyer, 326 a), certainly does not bear out this remarkable statement; and Coke himself quotes no authority. Why should not each tenant in tail disentail his own share? (Fines and Recoveries Act, 1833, s. 23; *Tufnell v. Borrell* (1875), L.R. 20 Eq. 194).

(d) Co. Litt. 20 b.

1712. On the death of one joint owner, his interest passes (subject to §§ 1713–1717 *post*) to the surviving joint owner or owners, notwithstanding any disposition by the testament of the deceased joint owner. *Right of survivorship*

Litt. ss. 280–282, 287.

This is the most characteristic feature of joint ownership; and, while it makes the form of ownership highly convenient in some cases (e.g. for the interests held by trustees, who are invariably made joint owners), in others it tends to work injustice. Various modifications (§§ 1713–1717 *post*) have been introduced to meet the latter difficulty.

1713. When property is vested in two or more persons jointly as partners in trade or business, for any legal interest other than a legal interest in land,^(a) that interest will, on the decease of one of them, survive to the other or others. But such other or others will, so far as necessary, be deemed trustees for the deceased partner's representatives of the beneficial interest (if any) which belonged to the deceased partner at the time of his death.^(b) *Partners*

(a) Law of Property Act, 1925, s. 1 (b).

(b) Partnership Act, 1890, s. 20 (2) (land).

Co. Litt. 182 a.

Jefferys v. Small (1683), 1 Vern. 217.

Morley v. Bird (1798), 3 Ves. 628, at p. 631, *per* } (chattels)

ARDEN, M.R.

The language of reporters and text-writers would sometimes lead one to think that, even at law, in the case of chattels, there was no survivorship. But the inconvenience of such a doctrine would be so great, that it is better to assume that only equitable interests are affected by the special rule. As to land, the Partnership Act is admirably clear.

*Joint mort-
gagees*

1714. When a single sum of money is advanced on mortgage by two or more persons, whether in equal or unequal shares, such persons are presumed to be owners in common of the mortgage money in proportion to their respective contributions; even though the security is conveyed to them as joint owners.^(a) And, even if it is expressly stated in the mortgage that the money belongs to the mortgagees on a joint account in equity as well as at law, parol evidence of facts (but not of mere statements of intention)^(b) will be admitted to show that it was intended that the money should belong beneficially to the mortgagees as owners in common.^(c)

(a) *Petty v. Styceard* (1631), 1 Rep. Ch. 57.

Rigden v. Vallier (1751), 2 Ves. Sen. 252, at p. 258, *per* Lord HARDWICKE, C.

Morley v. Bird (1798), 3 Ves. 628, at p. 631, *per* ARDEN, M.R.

Robinson v. Preston (1858), 4 K. & J. 505, at p. 511, *per* WOOD, V.C.

(b) *Harrison v. Barton* (1860), 1 John. & H. 287, at p. 294, *per* WOOD, V.C.

This was a case of joint purchase; but, *semble*, the rule must be the same for mortgages. Such a statement, in the absence of a contrary expression in the mortgage, will, if the mortgage was made or transferred after 1881, protect the mortgagor who pays the debt to the survivor or survivors (Law of Property Act, 1925, s. 111).

(c) *Re Jackson, Smith v. Sibthorpe* (1887), 34 Ch. D. 732.

*Joint
purchasers*

1715. There is no such presumption as that stated in § 1714 in the case of joint purchasers who contribute equally to the purchase money.^(a) But, even in such cases, parol evidence of facts may be admitted to show the intentions of the parties.^(b) And purchasers who contribute unequally to the purchase money are to be presumed to be beneficially interested, as owners in common of the property purchased, in proportion to the amounts of their respective contributions.^(c)

(a) *Lake v. Gibson* (1729), 1 Eq. Cas. Abr. 290.

Aveling v. Knipe (1815), 19 Ves. 441.

Garrick v. Taylor (1860), 29 Beav. 79.

Harris v. Fergusson (1848), 16 Sim. 308.

Robinson v. Preston (1858), 4 K. & J. at p. 510, *per* WOOD, V.C.

In *Harris v. Fergusson*, *ubi supra*, the contribution was unequal; and yet the purchasers were held joint owners. But the circumstances were special. The rule in the text does not apply to a purchase of the equity of redemption by mortgagees who are owners in common of the mortgage money (*Edwards v. Fashion* (1712), Prec. (Ch.) 332).

(b) *Harrison v. Barton* (1860), 1 John. & H. 287.

(c) *Lake v. Gibson*, *ubi supra*.

Robinson v. Preston, *ubi supra*.

1716. Subject to the rule that there can be no *Express severance* of a legal estate in land held in joint tenancy,^(a) any valid alienation, legal or equitable,^(b) of the share of any joint owner, whether to a person not being a joint owner with him, or to one of two or more being joint owners with him, works a severance of the legal or equitable interest, respectively, in such share, and makes the alienee an owner in common with the other joint owner or owners.^(c) But (*semble*) a mere demise for years of a joint share at a rack rent does not effect a severance of the reversion.^(d)

(a) Law of Property Act, 1925, s. 36 (2). But this provision does not prevent a release by one joint tenant to the other or others (*ibid.*).

(b) E.g. a covenant to settle on marriage (*Caldwell v. Fellowes* (1870), L.R. 9 Eq. 410; *Re Hewett, Hewett v. Hallett*, [1894] 1 Ch. 362), or a contract to sell (*Brown v. Raindle* (1796), 3 Ves. at p. 257, *per* ARDEN, M.R.), or an equitable charge on a reversionary interest (*Re Sharer, Abbott v. Sharer* (1912), 57 Sol. Jo. 60).

(c) Litt. ss. 294, 304. (But the alienation only affects the share of the alienor; and, if there were two or more other joint owners, they will continue to be such, as regards one another.)

(d) *Palmer v. Rich*, [1897] 1 Ch. 134. (WARRINGTON, J., however, in *Napier v. Williams*, [1911] 1 Ch. at p. 369, thought there would be a severance as to the term.)

Even in the case of a woman married before 1882, marriage of a female joint tenant did not of itself work a severance of her share, either in freeholds or leaseholds (*Palmer v. Rich*, *ubi supra*). And it is doubtful whether there can be a severance of a joint ownership of a legal thing in action (*Re McKerrell, McKerrell v. Gowans*, [1912] 2 Ch. at p. 653).

*Implied
severance*

1717. Subject as in § 1716 provided, any circumstances from which it may be inferred that joint owners have agreed to treat the joint ownership as at an end, without converting their interests into severalty, will work a severance of their beneficial interests, and make them owners in common.

Williams v. Hensman (1861), 1 John. & H. 546.

Palmer v. Rich, ubi supra.

TITLE III—OWNERSHIP IN COMMON

1718. Subject to the rule that there cannot be an undivided share in a legal estate in land,^(a) any conveyance or transfer of property, including a purely incorporeal hereditament^(b) (*semble*, other than a legal chose in action),^(c) to two or more persons with words of severance,^(d) or with express direction to hold in common, will create ownership in common between such persons. Owners in common may have unequal though undivided shares;^(e) and there is no right of survivorship amongst them.^(f)

(a) Law of Property Act, 1925, s. 1 (6).

(b) *Ibid.* s. 187 (2).

(c) Before the Judicature Act, 1873, s. 25 (6), there could not have been a legal ownership in common of a legal thing in action in the nature of a debt (*Re McKerrell, McKerrell v. Gowans*, [1912] 2 Ch. 648, at p. 653); and, regard being had to *Forster v. Baker* (*ante*, § 1626, n. (a)), it seems doubtful whether the Act has altered the law in that respect. For the present rights of co-owners of a patent, see *ante*, §§ 1705, 1706.

(d) Such words are "equally to be divided" (*Goodtitle d. Hood v. Stokes* (1752), 1 Wils. 341), "share and share alike" (*Rigden v. Vallier* (1751), 2 Ves. Sen. at p. 256, *per* Lord HARDWICKE, C.), "equally", "among", "between" (*Morley v. Bird* (1798), 3 Ves. at 631, *per* ARDEN, M.R.).

(e) Litt. s. 294.

Sturton v. Richardson (1844), 13 M. & W. 17.

(f) Litt. s. 321.

By the Law of Property (Entailed Interests) Act, 1932, s. 1, the proceeds of sale under the statutory trusts (*ante*, § 1702) of land held in common in tail will be held for similar interests, thus overruling *Re Price*, [1928] 1 Ch. 579.

1719. Ownership in common may also be created by any act or series of acts which works a severance of a joint ownership,^(a) or by an alienation by an owner in severalty of any share in his ownership to another to be held in co-ownership with him.^(b)

(a) *Ante*, §§ 1716, 1717.

(b) Litt. s. 298.

*Limitation in
remainder*

1720. A limitation of land by way of contingent remainder (*ante*, § 1269) to the heirs, or the heirs of the body, of two living persons who cannot intermarry, makes such heirs, if they take at all, tenants in common without words of severance.

Windham's (Justice) Case (1589), 5 Co. Rep. at 8a.

Roe d. Nightingale v. Quariley (1787), 1 Term Rep. 630.

Semble : if the limitation were executory, the heirs might take as joint tenants.

*Liability on
lease*

1721. Assignees in common of a leasehold interest are jointly and severally liable to the reversioner on the covenants in the lease which run with the reversion (*ante*, § 1269).

United Dairies, Ltd. v. Public Trustee, [1923] 1 K.B. 469.

TITLE IV—CO-PARCENARY

1722. Where, under the law of inheritance, real *How created* or personal ^(a) property descended upon two or more persons as co-heirs of the purchaser or person last entitled, such persons were said to hold the property as co-parceners.^(b)

(a) Law of Property Act, 1925, s. 130.

(b) Litt. s. 241.

Inheritance Act, 1833, s. 2.

Law of Property Amendment Act, 1859, s. 19.

The rules of inheritance are briefly dealt with in, *post*, §§ 2058–2061. Broadly speaking, all females in the same degree of inheritance take equally at common law. Descent to the heir has been abolished, and in the case of deaths after 1925, co-parcenary can only arise (i) on the death of the owner of an entail which has not been barred, and (ii) where the deceased was of full age and of unsound mind at the end of 1925 and dies intestate as to land without having recovered his testamentary capacity (Administration of Estates Act, 1925, ss. 45 (2), 51 (2)).

1723. There is no right of survivorship among *No survivorship* co-parceners; but the co-parcenary continues by descent until a co-parcener alienes his or her share.^(a) The alienee then holds as tenant in common with the other co-parcener or co-parceners; but the latter, if more than one, continue (until alienation) to hold as co-parceners among themselves.^(b)

(a) Co. Litt. 164.

(b) Litt. 262.

Co. Litt. 173 b.

1724. The shares of co-parceners are distinct, *Distinct sharer* though undivided; and, notwithstanding the Inheritance Act, 1833, s. 2, will descend separately to the heirs of each co-parcener.

Cooper v. France (1850), 19 L.J. (Ch.) 313.

S. 2 of the Inheritance Act, 1833, provided that descent should in all cases be traced from the purchaser. G purchased land and died, leaving two daughters, E and S. E died intestate, leaving one son ; and it was contended that he and S, the surviving daughter of G, each inherited one half of E's moiety, as co-heirs of G. But the Court held that E's son took the whole of E's share. It is, however, quite clear that, in the second generation, the shares of co-parceners need not necessarily be equal (Co. Litt. 164 b).

SECTION XVII
FIDUCIARY OWNERSHIP (TRUSTS)

TITLE I—GENERAL

1725. A trust is an obligation to hold and administer or deal with property conscientiously for the benefit of a person or persons other than the person subject to the obligation. *Definition*

Re Williams, Williams v. Williams, [1897] 2 Ch. 12, at p. 19, *per* LINDLEY, L.J.

The origin of the “use, trust, or confidence” has been briefly described in § 1281 ; where it is pointed out that, by means of a strict judicial interpretation of the Statute of Uses, three classes of uses escaped the operation of that statute, and remained, under the name of “trusts”, still recognized only by Courts of Equity. To these, later developments added other equitable interests ; but by far the most important example of equitable interests is still the trust, which has extended beyond its original scope as a scheme for the protection of beneficial interests in land from the rigorous requirements of the common law, and is now freely applicable to all classes of beneficiaries and all kinds of proprietary rights. Every completely constituted trust must contain four elements, viz. (i) a trustee or trustees, (ii) a beneficiary or beneficiaries (*cestuis que trustent*), who may include the or a trustee or trustees, but must not be identical with him or them, (iii) property the subject-matter of the trust, and (iv) an obligation, enforceable in a Court of Equity, on the trustee or trustees to administer or deal with the property for the benefit of the beneficiaries (*Knight v. Boughton* (1844), 11 Cl. & Fin. 513, at p. 551, *per* Lord COTTENHAM ; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, at p. 19, *per* LINDLEY, L.J.). The passing of the Judicature Act, though it has made all branches of the Supreme Court tribunals administering both law and equity, has not (at least directly) affected the peculiar position of trusts as equitable interests based on conscientious obligation. Where no such obligation can be enforced against the legal owner of the property alleged to be the subject-matter of the trust, there is no trust. And a beneficiary of full age and capacity, absolutely entitled to the trust property, or even (in the case of pure personality) an undivided share thereof, can call upon the trustee to convey to him the legal ownership, and thus put an end to

the trust (*Saunders v. Vautier* (1841), Cr. & Ph. 240 ; *Re Marshall, Marshall v. Marshall*, [1914] 1 Ch. 192).

*Peculiar
trusts*

1726. Generally speaking, every trust imposes upon the trustee a specific obligation to fulfil the express directions of the trust. But—

- (i) a trust may also be so constituted as to leave it to the discretion of the trustee in what manner and to what extent it shall be carried out (“discretionary trust”);

Gisborne v. Gisborne (1877), 2 App. Cas. 300.
Train v. Clapperton, [1908] A.C. 342.

In these cases, so long as the trustees act *bonâ fide*, they cannot be interfered with. But the surplus of the property (if any) cannot be claimed by the trustee beneficially. A modern example of the discretionary trust is the so-called “protective trust”, by which it is endeavoured to protect the beneficiary against his own extravagance or misfortune, by making his life interest terminable on attempted alienation, and leaving it to the trustees to deal with at their discretion. The discretion of the trustees will then (where the trust comes into operation after 1925) be guided by the terms of s. 33 of the T. Act, 1925.

- (ii) property may be disposed of in such a way as to authorize the takers to expend the whole or part of it, at their discretion, for the maintenance of specific animals or non-sentient objects ;

Re Dean, Cooper-Dean v. Stevens (1889), 41 Ch. D. 552.

Of course, only a human being can enforce a trust ; but, in *Re Dean*, it was held that the so-called trustees, if they did not carry out the direction, could not retain the property for their own benefit. Such a provision must observe the Rule against Perpetuities (*Carne v. Long* (1860), 2 De G.F. & J. 75).

- (iii) in the case of a charitable trust, the choice of the institutions or objects to be benefited, as well as the mode of carrying out the trust, may be left entirely to the trustee or to the Court.

Re Allen, Hargreaves v. Taylor, [1905] 2 Ch. 400.

Re Garrard, Gordon v. Craigie, [1907] 1 Ch. 382.

A.-G. v. Mathieson, Re Wilkinson and Fell's Contract, [1907] 2 Ch. 383.

But if there is any liberty to expend an unspecified part of a fund so left on objects not charitable, the whole trust will be bad for uncertainty (*Dunne v. Byrne*, [1912] A.C. 407; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] A.C. 341. For other peculiarities affecting a charitable trust see Title IX *post*).

1727. It is a question of construction for the Court in each case, whether words of advice or entreaty accompanying a gift of property are intended to create a trust binding on the donee, or are mere expressions of the wishes of the donor, which have no legal effect. *Precatory trusts*

Comiskey v. Bowring-Hanbury, [1905] A.C. 84.

Re Conolly, Conolly v. Conolly, [1910] 1 Ch. 219.

Re Atkinson, Atkinson v. Atkinson (1911), 80 L.J. (Ch.) 370.

Re Williams, [1933] Ch. 244.

Such questions arise almost exclusively on testamentary gifts; and the tendency of the Courts is now against the recognition of "precatory trusts" (*Re Atkinson, Atkinson v. Atkinson, ubi supra*, at p. 372, *per* COZENS-HARDY, M.R.).

1728. A trust may be created by express words ("express trust"), by conduct of the parties ("implied trust"), or by operation of law ("constructive trust").^(a) No technical language or special form is necessary to create an express trust;^(b) except that a declaration of trust respecting any land, or any interest therein, must be manifested and proved by some writing signed by some person who is able to declare such trust,^(c) and that no testamentary trust can be created, except by testament executed in conformity with the requirements of the Wills Act, 1837, or other Act of Parliament (*post*, §§ 1941-1952).^(d) *Classification of trusts*

(a) *Soar v. Ashwell*, [1893] 2 Q.B. 390. (As was pointed out in this case, these distinctions are not always consistently employed.)

(b) *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L.J. (Ch.) at p. 371, *per* COZENS-HARDY, M.R.

- (c) L.P.A., 1925, s. 53 (1) (b), reproducing, with amendments, the corresponding clauses of the Statute of Frauds.

It will be observed that an express trust of lands need not be *created* by writing. It is sufficient if it is "manifested and proved" by writing, which may be drawn up long after the creation of the trust (*Forster v. Hale* (1800), 5 Ves. 308); and the requirements of the statute do not extend to implied or constructive trusts (*ibid.* subs. (2)). But a disposition of an equitable interest or trust subsisting at the time of the disposition must be *in writing* signed by the person disposing of the same or by his agent (*ibid.* s. 53 (1) (c)).

- (d) The Court will not allow a devisee or legatee to retain for his own benefit property as to which he was clearly informed that it was intended to be held by him for the benefit of other persons (*Tee v. Ferris* (1856), 2 K. & J. 357; *McCormick v. Grogan* (1869), L.R. 4 H.L. 82; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220). Where the legatee takes apparently beneficially on the face of the will, the communication may be made at any time before the testator's death (*Moss v. Cooper* (1861), 1 John. & H. 352; *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531). But where the legatee takes as trustee on the face of the will, but no objects are there disclosed, the communication must (*semble*) be made before or at the making of the will (*Re Blackwell, Blackwell v. Blackwell*, [1929] A.C. 318; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236). If no communication is made until after the testator's death, then the legatee will take beneficially in the first case (*Wallgrave v. Tebbs* (1855), 2 K. & J. 313), and on a resulting trust in the second case (*Re Cooper, Le Neve-Foster v. National Provincial Bank*, [1939] Ch. 580). Where the bequest is to joint tenants, if one was informed of the trusts before execution of the will, all are bound: if one was informed after the execution of the will, only he is bound. But if the bequest is to tenants in common, then whether one of them was informed before or after the execution of the will, he only is bound (*Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237).

*Imperfectly
constituted
trusts*

1729. Where there has been an imperfect attempt to constitute a valid trust, and the attempt has failed, either from the omission of some formality,^(a) or because the property intended to be the subject-matter of the trust was not then in existence,^(b) the Court will not enforce the completion of the trust, except on the application of persons who have given (or are deemed to have given)^(c) valuable consideration for the trust.

- (a) *Milroy v. Lord* (1862), 4 De G.F. & J. 264.
Richards v. Delbridge (1874), L.R. 18 Eq. 11.

These were cases of imperfect assignments, intended to pass the ownership of the property. But a binding trust may clearly be created without assignment of property, if the settlor declares himself, in unmistakeable terms, to hold the property in trust for the beneficiaries (*Wheatley v. Purr* (1837), 1 Keen, 551).

(b) *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697.

(c) E.g. children under a marriage settlement. (But, if the trust is enforced by a purchaser for value, it will enure also for the benefit of volunteers, at any rate as against the settlor and his representatives (*Davenport v. Bishopp* (1846), 1 Ph. 698; *A.-G. v. Jacobs-Smith*, [1895] 2 Q.B. 341.)

1730. Subject to § 1731, an implied trust will be deemed to have been created whenever, from the conduct of the parties to a transaction involving the transfer or dealing with property, the Court considers that it was the intention of the parties that a trust should be created. In particular—

Implied trusts

- (i) when, by direction of a purchaser of property, the conveyance of such property is made to a third person, not being a person *in loco filii* of the purchaser, such third person will be presumed to be a trustee for the purchaser ;

Ryall v. Ryall (1739), 1 Atk. 59.

Where the transferee is *in loco filii* of the purchaser, the transaction is deemed to be an advancement by the latter for the benefit of the transferee (*Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92).

- (ii) when the owner of pure personalty transfers it into the names of himself and a stranger (being a volunteer), a resulting trust for the benefit of the transferor will be presumed, in the absence of evidence to the contrary ;

Marshall v. Crutwell (1875), L.R. 20 Eq. 328.

Re Eykyn's Trusts (1877), 6 Ch. D. 115.

Standing v. Bowring (1885), 31 Ch. D. 282, at p. 287, *per* COTTON, L.J.

Before 1926, there was a distinction between a voluntary transfer of personalty and realty, as to the former there was a resulting trust, but not in the latter for a conveyance to the use of the grantee not only passed the legal estate but rebutted the *prima facie* presumption of a resulting trust (*Young v. Peachy* (1742), 2 Atk. 254, at p. 257, *per* Lord HARDWICKE; *Fowkes v. Pascoe* (1875), 10 Ch. App. 343 at

p. 348, *per* JAMES, L.J.). It would seem that since 1925 a voluntary transfer of land will be construed in the same way as personalty (Law of Property Act, 1925, s. 60 (3)). (See note to § 1731, *post.*) Formerly a wife stood in such a position towards her husband; and (*semble*) the passing of the Married Women's Property Act, 1882, did not make any difference in this respect (*Dunbar v. Dunbar*, [1909] 2 Ch. 639). It seems much more difficult to say whether or not the Act has enabled the presumption of advancement to be raised in the case of a transfer or purchase by a married woman (*Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574; *Mercier v. Mercier*, [1903] 2 Ch. 98). The Law of Property Act, 1925, s. 170, and the Law Reform (Married Women and Tortfeasors) Act, 1935, ss. 2, 4, do not seem to have affected the question. (See *Re Ames' Settlement*, [1946] Ch. 217, [1946] 1 All. E.R. 689.)

- (iii) when, either from the failure of the beneficiaries, the failure or illegality of the objects of the trust, the vagueness or incompleteness of the directions given to the trustees, or otherwise, the primary purposes of a trust have ceased to exist, or have never existed, there will be an implied or "resulting" trust of the undisposed of property, for the benefit of the settlor or his representatives. This rule does not apply to charitable trusts (*post*, §§ 1803-1808).

Ackroyd v. Smithson (1780), 1 Bro. C.C. 503.

Page v. Leapingwell (1812), 18 Ves. 463.

Merchant Taylors' Co. v. A.-G. (1871) 6 Ch. App. 512, at p. 518, *per* JAMES, L.J.

Formerly, in the case of land, if the settlor and his representatives failed, the trustees could retain the property for their own benefit (*Burgess v. Wheate* (1759), 1 Eden, 177). But the Crown now claims under the Administration of Estates Act, 1925, s. 46 (1), as *bona vacantia*. And the Crown was always entitled, in such cases, to pure personalty, as *bona vacantia* (*Re Gosman* (1880), 15 Ch. D. 67). Care must, however, be taken to distinguish between a trust, and an absolute gift with mere directions as to user (*Re Andrew's Trust, Carter v. Andrew*, [1905] 2 Ch. 48), or a similar gift subject simply to charges (*King v. Denison* (1813), 1 Ves. & B. 260). In such cases, the donee is entitled to retain the gift, notwithstanding the impossibility of carrying out the directions, or the satisfaction of the charges. And, where a settlor has transferred property to trustees for the purpose of carrying out an illegal object, the settlor may find it impossible to recover the property, if the illegal purpose or any sub-

stantial part of it has been carried out (*Re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616).

1731. A gratuitous conveyance, either of land or (*semble*) of pure personalty, to a stranger, does not, of itself, raise any presumption of a resulting trust. *Voluntary conveyance*

Lloyd and Fobson v. Spillet (1741), 2 Atk. 148 (land).

Young v. Peachey (1742), *ibid.* 254.

George v. Bank of England (1819), 7 Price, 646, at p. 651, *per* RICHARDS, C.B. (personalty). But see

Fowkes v. Pascoe (1875), 10 Ch. App. 343.

There is great diversity of opinion on the effect of a voluntary conveyance of personalty or land. It is difficult to see why there should be a resulting trust in the case of a voluntary transfer of personalty for if this has been effected by deed or delivery it amounts to a legal gift (*Irons v. Smallpiece* (1819), 2 B. & Ald. 551). But the views of modern text-book writers favour a resulting trust in both cases (see Lewin on *Trusts*, 14th ed., p. 135; Underhill, *Law of Trusts and Trustees*, 9th ed., pp. 169, 175; 2 White & Tudor's *L.C.*, 8th ed., pp. 833-835).

1732. A constructive trust arises when a trustee has received, in his capacity as such, property which, though not comprised in an express trust, he is not legally entitled to retain for his own benefit,^(a) or where a stranger to the trust has received property belonging to the trust in circumstances which do not entitle him to retain it as against the beneficiaries.^(b) Such property is held by the recipients subject to a constructive trust for the beneficiaries, under, and on the terms of, the original trust. *Constructive trust*

(a) *Keech v. Sandford* (1726), Sel. Cas. Ch. 61.

Griffith v. Owen, [1907] 1 Ch. 195.

A trustee is not, in the absence of special circumstances, allowed to make a profit out of his trust; and he will be compelled to account, for the benefit of the trust, even for incidental gains. The cases in which this rule is applied are stated in § 1760, *post*.

(b) *Rackham v. Siddall* (1849), 1 Mac. & G. 607.

Soar v. Ashwell, [1893] 2 Q.B. 390, at p. 405, *per* KAY, L.J.

1733. Any trust which has for its substantial aim the achievement of any illegal purpose, is void as *Trust for unlawful purposes*

regards that purpose, and, if such purpose is inextricably mixed up with the other purposes of the trust, is void altogether. But where the substantial purpose of the trust may be achieved without violating the law, any illegal means prescribed for the attainment of such purpose may be disregarded, and the trust will be valid ("mere machinery").

Chapman v. Brown (1801), 6 Ves. 404.

Lloyd v. Lloyd (1852), 2 Sim. (N.S.) 255.

Re Appleby, Walker v. Lever, [1903] 1 Ch. 565.

Re Ludwig, Ludwig v. Evans, [1916] 2 Ch. 26.

Re Borwick, Borwick v. Borwick, [1933] Ch. 657.

Does the latter part of this rule apply to any defect other than a perpetuity? For the application of the Rule against Perpetuities to charitable trusts, see *ante*, § 1681 (xi). It should be noted, that a trust which in itself is free from illegality, is not made void by the fact that it was made from an illegal motive or for an illegal consideration (*Ayerst v. Jenkins* (1873), L.R. 16 Eq. 275). But see *Phillips v. Probyn*, [1899] 1 Ch. 811, which seems difficult to reconcile with the earlier case. It may be mentioned that the ban which rendered gifts for "superstitious uses" void has disappeared (*Re Caus, Lindeboom v. Camille*, [1934] Ch. 162), and that the old repressive statutes have been repealed by the Mortmain and Charitable Uses Act, 1888, s. 13, and the Roman Catholic Relief Act, 1926, s. 1.

*Property
outside the
jurisdiction*

1734. The Court has power to enforce trusts against persons within its jurisdiction; even though the property subject to the trust is situated outside the jurisdiction.^(a) But the Court cannot directly affect or control immovables outside the jurisdiction;^(b) and it will not, as a rule, adjudicate on questions relating to the title or right to the possession of immovable property out of the jurisdiction, unless there exists between the parties to the action some personal relation arising out of contract or implied contract, fiduciary relationship, or fraud.^(c)

(a) *Penn v. Baltimore (Lord)* (1750), 1 Ves. Sen. 444 (land).

Ewing v. Orr Ewing (1885), 10 App. Cas. 453 (personalty).

Re Smith, Smith v. Smith, [1913] 2 Ch. 216 (land).

(b) *Re Piercy, Whitwham v. Piercy*, [1895] 1 Ch. 83.

(c) *Deschamps v. Miller*, [1908] 1 Ch. 856, at p. 863, *per* PARKER, J.

1735. The disclaimer by a person of property *Disclaimer* expressed to be conveyed to him for charitable purposes does not render the trust ineffectual, if it can be carried out by other persons duly appointed as trustees.

Robson v. Flight (1865), 4 De. G.J. & Sm. 608.

Re Wilson-Barkworth, Burstall v. Deck (1933), 50 T.L.R. 82.

This appears to be only an illustration of the general principle that "a trust will not fail for want of a trustee". As to Disclaimer, see § 1736, *post*, note (g).

TITLE II—APPOINTMENT AND REMOVAL OF TRUSTEES

*Who may be
a trustee*

1736. Any person, corporate^(a) or individual, including a married woman,^(b) a bankrupt,^(c) an alien^(d) and a convict,^(e) is capable of being a trustee ; but an infant^(f) cannot now be an express trustee ; and no one can be compelled to become a trustee against his will.^(g)

- (a) A corporation may always be a trustee of pure personalty (*A.-G. v. St. John's Hospital, Bedford* (1865), 2 De G.J. & Sm. 621, 635), and also of real property if it has authority by Statute or licence to hold land (Mortmain and Charitable Uses Act, 1888, s. 1). It may also be a co-trustee with an individual or another corporation (Bodies Corporate (Joint Tenancy) Act, 1899). See the definition of "Trust Corporation" in Law of Property Act, 1925, s. 205 (1) (xxviii) and Law of Property (Amendment) Act, 1926, s. 3.
- (b) Law of Property Act, 1925, s. 170 (1) and (2).
- (c) The Bankruptcy Act, 1914, s. 38 (1), provides that the property held by a bankrupt as trustee shall not be divisible among his creditors. A bankrupt trustee may be removed by the Court (Trustee Act, 1925, s. 41).
- (d) *Meinertzhagen v. Davis* (1844), 1 Coll. 335. The British Nationality and Status of Aliens Act, 1914, s. 17, allows an alien to hold real property in this country.
- (e) Although it is a ground for his removal by the Court (Trustee Act, 1925, s. 41), where a trustee becomes a convict within the meaning of the Forfeiture Act, 1870, trust property vested in him (exclusive of his own beneficial interest) does not vest in an administrator appointed under that Act (Trustee Act, 1925, s. 65).
- (f) Law of Property Act, 1925, s. 20. But an infant may be deemed to be holding as trustee on a resulting trust (*Re Vinogradoff, Allen v. Jackson*, [1935] W.N. 68). For the effect of a conveyance of a legal estate to an infant, see *ibid.* s. 19 (4), (5) and Settled Land Act, 1925, s. 27.
- (g) *Robinson v. Pett* (1734), 3 P.Wms. 249, at p. 251, *per* Lord TALBOT. The onus of proving disclaimer is on those who assert it (*Re Arabis and Class's Contract*, [1891] 1 Ch. 601). Disclaimer is usually effected by deed though it may be inferred from conduct (*Stacey v. Elph* (1833), 1 My. & K. 195 ; *Re Clout and Frewer's Contract*, [1924] 2 Ch. 230. The disclaimer must be of the whole of the trusts (*Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, and once he has accepted the trustee can no longer

disclaim (*Conyngham v. Conyngham* (1750), 1 Ves. Sen. 522; *Re Sharman's Will Trusts, Public Trustee v. Sharman*, [1942] Ch. 311).

The rule stated in this para. applies even when, on the death of a trustee, the trust estate passes to his personal representatives: though they become the legal owners of the trust property, they are not trustees, but until the appointment of new trustees, they can exercise the powers of the deceased (Trustee Act, 1925, s. 18 (2)).

1737. Subject to the existence of trustees at the end of the year 1925, there cannot be more than four trustees of a settlement of land, other than settlements for charitable purposes or trustees of terms of years absolute created by settlements on trusts for raising money or of similar terms created under the statutory remedies relating to annual sums charged on land (*ante*, §§ 1213, 1214). *Number of trustees of land*

Trustee Act, 1925, s. 34 (1), (3).

If more than four trustees are named, only the first four named who are able and willing to act become trustees (*ibid.* (2)). See also Administration of Estates Act, 1925, s. 42, and Trustee Act, 1925, s. 14 (2).

1738. A trustee may be appointed—

- (i) by the settlor in the settlement creating the trust ;

Appointment of trustee

This is the normal method of original appointment.

- (ii) by the person nominated for the purpose by the settlement (*post*, § 1739) ;

Trustee Act, 1925, s. 36 (1) (2).

Unless the settlement otherwise provides, this power cannot, of course, be exercised, except to supply a vacancy among the trustees. Under the statutory power contained in this section of the Act, the donee may appoint himself; this was not the case under the Trustee Act, 1893 (*Re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435), and if the power is given expressly by the settlement, it is a question of construction whether the donee may appoint himself (*Montefiore v. Guedalla*, [1903] 2 Ch. 723; cf. *Re Skeats' Settlement, Skeats v. Evans* (1889), 42 Ch. D. 522). The donee may be empowered to appoint only on specified events (*Re Wheeler and De Roehow*, [1896] 1 Ch. 315). If the donee is an infant, an appointment by him will

be set aside if it is not to his benefit and the appointee is a person whom the Court would not have appointed (*Re Parsons, Barnsdale and Smallman v. Parsons*, [1940] Ch. 973).

- (iii) if there is no such person, or no such person able or willing to act, then, subject to the terms of the settlement, by the surviving or continuing trustee or trustees, or, if there is no such person, by the personal representatives of the last surviving or continuing trustee;

Trustee Act, 1925, s. 36 (1) (b).

The appointment under this provision must be in writing (*ibid.*).

- (iv) by the Court, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult, or impracticable, to do so without the assistance of the Court.

Trustee Act, 1925, s. 41 (1).

But the Court will not exercise its powers if there is any other person able and willing to act (*Re Higginbottom*, [1892] 3 Ch. 132).

*Removal of
trustee*

1739. Where a trustee, whether original or substituted, and whether appointed by a Court or otherwise, is dead or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act, or is incapable of acting, therein, or is an infant, then, subject to the restrictions as to the number of trustees the person or persons having under the instrument creating the trust power to appoint new trustees, or, failing them, the persons specified in § 1738 (iii) *ante*, may, by writing, appoint another trustee or trustees in his place.^(a) Subject to this provision, a trustee can only be removed by the order of the Court.^(b)

(a) Trustee Act, 1925, s. 36 (1).

(b) Even the Court cannot, except for good reasons, remove a trustee who desires to continue in office. (*Re Blanchard* (1861), 3 De G.F. & J. 131. But see *Re Henderson, Henderson v. Henderson*, [1940] Ch. 764.

It will be noticed that even this statutory provision does not formally authorize the removal of a trustee ; though, doubtless, the appointment of a substitute has substantially that effect.

1740. A trustee may retire :

*Retirement
of trustee*

- (i) under an express power in the trust instrument,
- (ii) under the Trustee Act, 1925, s. 36 (1), by which a trustee who desires to be discharged may be replaced by a new appointment (*ante* § 1737),
- (iii) under the Trustee Act, 1925, s. 39 (1) by which a trustee desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees, then if the trustee desiring to be discharged, by deed so declares, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of such trustee, the trustee desirous of being discharged shall be deemed to have retired from the trust, and will by the deed be discharged therefrom without any new trustee being appointed in his place,
- (iv) by consent of all beneficiaries who must all be *sui juris*,^(a)
- (v) under an order of the Court.^(b)

(a) *Wilkinson v. Parry* (1828), 4 Russ. 272.

(b) *Letterstedt v. Broers* (1884), 9 App. Cas. 371. It was formerly said that a trustee who retired from mere caprice had to pay the costs of the appointment of a new trustee (*Forshaw v. Higginson* (1855), 20 Beav. 485), but since he is now given a statutory power to retire *if desirous of being discharged* it seems that he would now be exempt from such costs and would be entitled to his own (*Re Chetwynd's Settlement, Scarisbrick v. Newinson*, [1902] 1 Ch. 692). Where the Court discharges a trustee it is not always necessary for the Court to appoint a new trustee in his place (*Re Chetwynd's Settlement, Scarisbrick v. Newinson* (*supra*)). .-

*Not less than
two trustees*

1741. Where new trustees are appointed under § 1738 (ii), (iii) and (iv) *ante*, the number of trustees must not be allowed to fall below two ; unless only one trustee was originally appointed,^(a) or unless a trust corporation is acting as a trustee of the settlement.^(b)

(a) Trustee Act, 1925, s. 37 (1), s. 36 (6).

(b) *Ibid.* subs. (1) (c).

But the Public Trustee must not be appointed a trustee by anyone but the settlor without an order of the court, if the settlement contains a direction to the contrary (Public Trustee Act, 1906, s. 5 (3)) ; and, even where there is no such direction, the Court may, on the application of a beneficiary, prohibit the appointment of the Public Trustee (*ibid.* (4)). Generally speaking, the *onus* is on the party proposing the appointment of the Public Trustee (*Re Hope Johnstone's Settlement Trusts* (1909), 25 T.L.R. 369, *per* PARKER, J. ; *Re Firth, Firth v. Loveridge*, [1912] 1 Ch. 806). And notice must be given to all parties beneficially interested of any proposal to make such an appointment (Public Trustee Act, 1906, s. 5 (4)).

*Judicial
trustee*

1742. The Court may, on application by a settlor or intending settlor, or by any trustee or beneficiary, in its discretion appoint a judicial trustee, either as a sole or joint trustee, and, if sufficient cause is shown, in place of all or any of the existing trustees. Such person may be either a fit and proper person nominated in the application, or, in the absence of such nomination, or if the Court is not satisfied with the fitness of the person so nominated, an official of the Court.^(a) In either case, the judicial trustee will be subject to the control and supervision of the Court, which may give him any general or special direction in regard to the trust or the administration thereof.^(b) The Public Trustee may be appointed a judicial trustee under this paragraph.^(c)

(a) Judicial Trustees Act, 1896, s. 1 (1).

(b) *Ibid.* (3), (4).

(c) Public Trustee Act, 1906, s. 2 (1) (a).

A retiring judicial trustee has no power to appoint a successor under s. 36 of the Trustee Act, 1925 (*Re Johnston, Mills v. Johnston*, [1911] W.N. 234).

TITLE III—DUTIES OF TRUSTEES

1743. It is the duty of a trustee to administer the trust property in accordance with the directions of the settlement ;^(a) and, in so far as the settlement is silent, according to the standard of diligence and discretion approved by the Court for the conduct of trustees.^(b)

To carry out settlement and exercise diligence

(a) *Harrison v. Randall* (1851), 9 Hare, 397.

Only in cases of obvious necessity, and to carry out the settlor's substantial wishes, will the Court sanction a departure from the terms of the settlement (*Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534—described by COZENS-HARDY, L.J., in *Re Tollemache*, [1903] 1 Ch. 955 at p. 956, as the "high water mark of . . . extraordinary jurisdiction"). Under the Trustee Act, 1925, s. 57, the Court is given wide powers to authorize transactions not contemplated by the settlement (see *Re Mair, Richards v. Doxat*, [1935] Ch. 562). Even in the case of charitable trusts, there can be no application of the doctrine of *cy-près*, so long as any possibility of carrying out the settlor's directions remains (*Re Weir Hospital*, [1910] 2 Ch. 124). But, where the general intent of the settlor is clear, and the precise means prescribed by him to give effect to it are impossible of execution, the Court may, in the case of charitable trusts, adopt a *cy-près* scheme (*Biscoe v. Jackson* (1887), 35 Ch. D. 460 ; *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876). Where, however, there is a devise or bequest to a specific and then existing charitable institution, which comes to an end before the testator's death, the ordinary rule of lapse applies ; and the gift fails (*Re Ovey, Broadbent v. Barrow* (1885), 29 Ch. D. 560 ; *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19 ; *Re Harwood, Coleman v. Innes*, [1936] Ch. 285).

(b) *Speight v. Gaunt* (1883), 9 App. Cas. 1.

Learoyd v. Whiteley (1887), 12 App. Cas. 727.

The standard of diligence required of a trustee is very difficult to define. One of the best-known attempts is that of LORD BLACKBURN in *Speight v. Gaunt*, *ubi supra*, at p. 19, who describes it as that "of an ordinary prudent man of business . . . in managing similar affairs of his own"—a definition substantially adopted by Lord WATSON in *Learoyd v. Whiteley*, *ubi supra*, at p. 733. But, surely, a prudent man of business may, in certain circumstances, justifiably take risks in his own affairs, e.g. leave a debt on personal security, which no trustee, without express authority, would be justified in

doing. See remarks of LINDLEY, L.J., in *Re Whiteley, Whiteley v. Learoyd* (1886), 33 Ch. D. at p. 355.

*To exercise
discretion*

1744. In his administration, the trustee must act upon his own discretion ; neither, in the absence of special circumstances, throwing the burden on the Court,^(a) nor subject to §§ 1745-1746, delegating it to agents.^(b)

(a) *Perrins v. Bellamy*, [1899] 1 Ch. 797, at pp. 801-2, *per* ROMER, L.J.

Where a proper case exists, the trustees may either pay the trust fund into Court under s. 63 of the Trustee Act, 1925, or apply for the directions of the Court under O. LV, r. 3. The latter is the preferable course (*Re Giles* (1886), 34 W.R. 712). But even this step must not be resorted to, at the expense of the estate, without good cause (*Perrins v. Bellamy, ubi supra*) ; and this form of procedure is not suitable for the settlement of questions involving charges of fraud or wilful default (*Dowse v. Gorton*, [1891] A.C. 190, at p. 202) or even disputed facts (*Nutter v. Holland*, [1894] 3 Ch. 408).

(b) *Learoyd v. Whiteley, ubi supra*, at p. 732.

Turner v. Corney (1841), 5 Beav. 515, at p. 517, *per* Lord LANGDALE, M.R.

The trustee is, of course, entitled to expert advice in cases of difficulty ; but the decision must be his own. (*Fry v. Tapson* (1884), 28 Ch. D. 268.) He is entitled, where it is practically impossible for him to act in person, to delegate a purely ministerial act to a proper agent. (*Re Parsons, Ex parte Belchier, Ex parte Parsons* (1754), Amb. 218 ; *Speight v. Gaunt* (1883), 9 App. Cas. 1).

*May appoint
attorney in
absence*

1745. Notwithstanding § 1744, a trustee intending to remain out of the United Kingdom for a period of more than a month may, by power of attorney, attested by at least one witness and filed at the Central Office within ten days of its execution or receipt in the United Kingdom, with a statutory declaration by the trustee that he intends to remain out of the United Kingdom for such a period, delegate to any person other than a sole co-trustee (not being a trust corporation) the execution during the trustee's absence of all or any trusts powers (statutory or otherwise) and discretions vested in him (the trustee) either alone or jointly with any other person or persons.^(a)

But such delegation will not relieve the trustee for liability for the acts or defaults of his delegate ;^(b) and the power of attorney will not come into force until the trustee is out of the United Kingdom, and will be revoked by his return (thereto),^(c) except in favour of any person dealing with the delegate without actual notice of the revocation or that the power of attorney had never come into operation.^(d)

(a) Trustee Act, 1925, s. 25 (1), (4), (9).

(b) *Ibid.* (2).

(c) *Ibid.* (3).

(d) *Ibid.* (7), (8).

If the power of attorney confers a power to deal with land, an office copy must be filed at the Land Registry (*ibid.* (6)). See also Law of Property (Amendment) Act, 1926, Schedule.

1746. Subject to § 1747, a trustee is not responsible for the default of— *Not responsible in certain cases*

- (i) an agent whom he employs in good faith to do any act required to be done in the execution of the trust, including the receipt and payment of money ;

Trustee Act, 1925, s. 23 (1).

- (ii) an agent or attorney whom he has appointed to realize or administer trust property (real or personal) in any place outside the United Kingdom ;

Trustee Act, 1925, s. 23 (2).

- (iii) a solicitor whom he has appointed to be his agent to receive money or other valuable consideration or property receivable by the trustee under the trust, by permitting him to have the custody of and to produce a deed containing a receipt, the deed being executed or the receipt signed by the person entitled to give a receipt for that consideration ;

Trustee Act, 1925, s. 23 (3) (a).

Law of Property Act, 1925, s. 69.

Re Sheppard, De Brimont v. Harvey, [1911] 1 Ch. 50.

- (iv) a banker or a solicitor whom he has appointed to receive moneys payable under a policy of insurance, by permitting him to have the custody of and to produce the policy with a receipt by the trustee ;

Trustee Act, 1925, s. 23 (3) (c).

unless, in either of the last two cases, he leaves the money for an unreasonable time in the hands of such solicitor or banker, after he is aware of its receipt by him.

Trustee Act, 1925, s. 23 (3) Proviso.

Re Sheppard, De Brimont v. Harvey, ubi supra.

Re Vickery, Vickery v. Stephens, [1931] 1 Ch. 572.

Whereas the Trustee Act, 1925, s. 23 (2) is mainly declaratory (*Stuart v. Norton* (1860), 14 Moo. P.C.C. 17), and s. 23 (3) replaces Trustee Act, 1893, s. 17, it appears that s. 23 (1) introduces a new principle. The effect of this sub-section, as applied in *Re Vickery, Vickery v. Stephens, ubi supra*, is to substitute the test of "good faith" for the test of reasonableness in judging the conduct of a trustee when employing agents. According to this decision it would appear that a trustee may appoint an agent whether there is any real necessity for the appointment or not, and that he is not liable for mere carelessness in selecting or subsequently controlling the agent, but only for "bad faith" which is equivalent to "wilful default" within the meaning of s. 30 of the Act (§ 1747, *post*).

General provision

1747. A trustee is liable only for money and securities actually received by him ; notwithstanding that he has signed any receipt for the sake of conformity. And he is liable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss ; unless the same happens through his own wilful default.

Trustee Act, 1925, s. 30.

This section re-enacts s. 24 of the Trustee Act, 1893, which replaced s. 31 of the Law of Property Amendment Act, 1859. The principle upon which a trustee is made liable for the wrongful acts of others is that he himself has in some way been at fault (*Wilkins v. Hogg* (1861), 8 Jur. (N.S.) 25). "Wilful default" has been construed as meaning either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty. (See *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407; *Re Munton, Munton v. West*, [1927] 1 Ch. 262; *Re Vickery, Vickery v. Stephens, ubi supra.*).

1748. It is the duty of a trustee, subject to the terms of the settlement, to get in immediately all outstanding claims of the trust estate, and all such parts of the estate as may not be invested in authorized investments,^(a) and to invest all such parts of the estate as are not already so invested, in authorized investments. For the purposes of this Title, "authorized investments" means investments authorized by the settlement, or the investments described or referred to in section 1 of the Trustee Act, 1925.^(b) But, when exercising his statutory power of investment, the trustee must observe the conditions specified in sections 2 and 7 of the said Act,^(c) and must act in the exercise of his discretion, but subject to any consent or direction required by the instrument, if any, creating the trust, or by statute with regard to the investment of trust funds.^(d)

*To realize
outstanding
property*

(a) *M'Gachen v. Devo* (1851), 15 Beav. 84.

It does not necessarily follow that the trustees must immediately call in investments made by the settlor himself which they would not themselves be justified in making (*Re Chapman*, [1896] 2 Ch. 763, at p. 782). On the other hand, a direction in the settlement to invest in non-trustee securities does not prevent the trustee investing in trustee securities (*Re Burke*, [1908] 2 Ch. 248; *Re Warren, Public Trustee v. Fletcher*, [1939] Ch. 684), unless it is clearly exclusive (*Ovey v. Ovey*, [1900] 2 Ch. 524).

(b) This enactment sets out a considerable number of permitted investments, and ends by including "any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court". These securities will be found enumerated in R.S.C., O. XXII,

r. 17. The National Loans Act, 1939 authorizes trustees to invest in securities issued under that Act, and such an investment is authorized in spite of anything to the contrary contained in any instrument creating the trust, and without the consent of any other person though required by that instrument. (Cf. Trustee Act, 1925, s. 3 and s. 69 (2).)

(c) These conditions forbid the purchase of certain redeemable stock within fifteen years of the date fixed for redemption, at a price higher than its redemption value, or at any earlier date at more than 15 *per cent.* above its redemption value (s. 2). They also permit the trustees (subject to certain conditions) to hold certificates to bearer of certain stocks unless expressly prohibited by the instrument creating the trust (s. 7).

(d) Trustee Act, 1925, s. 3.

*Continuing
authorized
securities*

1749. A trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the trust instrument or the general law.

Trustee Act, 1925, s. 4.

Fixed loans

1750. Trustees lending money on lawful security may contract that such money shall not be called in during any period not exceeding seven years, provided that the interest is punctually paid and there is no breach of any covenant by the mortgagor for the maintenance and protection of the mortgaged property.

Trustee Act, 1925, s. 10 (1).

*Investing on
real security*

1751. A trustee who has power to invest in real securities may invest on mortgage, not only of a freehold interest, but of property (sc. land) held for an unexpired term of not less than two hundred years, and not subject to a reservation of a rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent, and on any charge, or upon any mortgage of any charge, made under the Improvement of Land Act, 1864.^(a) In the absence of express words, a power to invest in real securities does not authorize the trustee to purchase land.^(b)

- (a) Trustee Act, 1925, s. 5 (1).
- (b) *Re Mordan, Legg v. Mordan*, [1905] 1 Ch. 515.
Re Wragg, Wragg v. Palmer, [1919] 2 Ch. 58.

It must be admitted that the judicial authority for the last proposition is hard to discover. But the opinions of text-book writers appear to be uniform; and the proposition seems to be a fair inference from the terms of the section referred to in the first part of the paragraph. In *Re Mordan, Legg v. Mordan, ubi supra*, though the special words of the settlement were held to authorize a purchase, the truth of the general rule was not denied. Trustees for sale of land may buy land with the proceeds of the sale (Law of Property Act, 1925, s. 28 (1)). But see *Re Wakeman, National Provincial Bank, Ltd. v. Wakeman*, [1945] Ch. 177.

1752. A trustee who lends money on any property on which he can properly lend, is not chargeable with breach of trust merely on the ground of the insufficiency of the security at the time when the loan was made, if he acted on a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, and on the advice of such surveyor or valuer expressed in the report, and did not lend more than two-thirds of the value of the property expressed in such report.^(a) And if, in such circumstances, he advances more than such proportion on a mortgage security in other respects proper, he is only liable for the loss of the excess.^(b)

*Precaution
in lending
trust money*

- (a) Trustee Act, 1925, s. 8 (1).
- (b) *Ibid.* s. 9.

The mere fact that the valuer has previously acted for the mortgagor is not necessarily an objection (*Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261). The two-thirds standard is a minimum, not to be blindly followed (*Shaw v. Cates*, [1909] 1 Ch. 389). But there is no absolute rule that only one half should be lent on business premises (*Palmer v. Emerson*, [1911] 1 Ch. 758). If the investment is wholly unauthorized, the trustee is liable for the whole deficiency, though in such case he may take over the security on replacing the trust fund (*Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351).

*Dispensing
with full
title*

1753. A trustee is not chargeable with breach of trust merely for dispensing, wholly or partially, with the investigation of the lessor's title in lending on the security of leasehold property ; or, in purchasing or lending on any property, for accepting a shorter title than a purchaser under an open contract is entitled to require, if, in the opinion of the Court, the title he accepted was one which a person acting with prudence and caution would have accepted.

Trustee Act, 1925, s. 8 (2), (3).

For the strict rights of a purchaser in these respects under an open contract, see Addendum after § 384, *ante*.

*Acting under
power of
attorney*

1754. A trustee acting or paying money in good faith under a power of attorney is not liable for any such act or payment by reason of the fact that, unknown to the trustee, the maker of the power of attorney was subject to any disability or was dead, or had done some act to avoid the power, when the trustee did the act or made the payment.

Trustee Act, 1925, s. 29.

For the wider protection given by the Law of Property Act, 1925, to persons acting on powers of attorney, see *ante*, §§ 473, 474.

*Apportion-
ment of
charges be-
tween capital
and income*

1755. A trustee, under whose trust the income of the trust fund is payable to certain persons and the capital to others, must carefully apportion charges and expenses between income and capital. The following charges or expenses fall, subject to the terms of the settlement, upon income :—

- (i) rent of leasehold property held as part of the trust fund ;

Re Betty, Betty v. A.-G., [1899] 1 Ch. 821.

- (ii) repairs to similar property actually required by the lease to be made,^(a) but not merely voluntary repairs which the trustees are not legally bound to make ;^(b)

- (a) *Re Gfers, Cooper v. Gfers*, [1899] 2 Ch. 54.
Re Sutton, Sutton v. Sutton (1912), 56 Sol. Jo. 650.
- (b) *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28.
Re Sutton, Sutton v. Sutton, ubi supra.

The tenant for life under a testament is not chargeable with arrears of rent or repairs due at the testator's death ; but only with current charges (*Re Courtier, Coles v. Courtier* (1886), 34 Ch. D. 136, followed in *Re Sutton, Sutton v. Sutton, ubi supra*). As to the cost of repairs, other than those necessary to comply with the covenants in the lease, the rule was that this would be apportioned between capital and income (*Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408). But this rule is now subject to the wide powers given to trustees for sale of land by the Law of Property Act, 1925, s. 28 (1) and by the Settled Land Act, 1925, ss. 83, 84 and 102. (See *Re Gray, Public Trustee v. Woodhouse*, [1927] 1 Ch. 242 ; *Re Robins, Holland v. Gillam*, [1928] Ch. 721 ; *Re Conquest, Royal Exchange Assurance v. Conquest*, [1929] 2 Ch. 353 ; *Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88.)

- (iii) fire insurance premiums up to three-fourths of the value of insurable property, other than property which the trustee is bound to convey absolutely to any beneficiary on request ;

Trustee Act, 1925, s. 19.

The position of fire insurance is peculiar. The old rule was, that a trustee was not bound to insure (*Fry v. Fry* (1859), 27 Beav. 144) ; and the section just quoted is merely enabling. Consequently, it would seem that it still rests with the trustees (except in the case of a leasehold property where the lease requires it) to refuse to insure (*Re McEacharn, Gambles v. McEacharn* (1911), 103 L.T. 900). If the tenant for life himself insures, he has no claims against the estate for premiums (*Re Winchilsea's (Earl) Policy Trusts* (1888), 39 Ch. D. 168). On the other hand, he can take the whole of the insurance money (*Gausson v. Whatman* (1905), 93 L.T. 101) ; unless the remainderman can claim to have the premises rebuilt under s. 83 of the Fires Prevention Act, 1774 (*Re Quicke's Trusts, Poltimore v. Quicke*, [1908] 1 Ch. 887), as to which, see the Trustee Act 1925, s. 20.

- (iv) rates and current annual charges generally, except such as are specifically incurred for the permanent improvement of the property.

Fountaine v. Pellet (1791), 1 Ves. 337.

Re Barney, Harrison v. Barney, [1894] 3 Ch. 562.

Farnham's Settlement, Re, Law Union and Crown Insurance Co. v.

Hartopp, [1904] 2 Ch. 561.

Re Smith, Smith v. Dodsworth, [1906] 1 Ch. 799.

But legal costs, charges, and expenses (unless exclusively incurred for the benefit of the persons entitled to the income), are payable out of capital.

Norton v. Johnstone (1885), 30 Ch. D. 649.

Re McClure's Trusts, Carr v. Commercial Union Insurance Co. (1906), 76 L.J. (Ch.) 52.

Re Brandon, Samuels v. Brandon (1932), 49 T.L.R. 48.

Of course, as between the trustees who incur them and the beneficiaries, costs and other outgoings are a charge on both capital and income (*Stott v. Milne* (1884), 25 Ch. D. 710, at p. 715, *per SELBORNE, C.*). And see §§ 1779-1781.

*Wasting and
reversionary
securities*

1756. Where a testator has bequeathed^(a) the residue^(b) of his personal estate^(c) upon trust for the benefit of persons in succession, the trustees must, unless the will shows a contrary intention,^(d) convert all such parts of it as are (i) of a wasting, hazardous or otherwise unauthorized nature, or (ii) of a future or reversionary character, into authorized investments.

(a) This rule, known as the *Rule in Howe v. Dartmouth (Earl)* (1802), 7 Ves. 137, is confined to property settled by will and does not apply to property settled by deed (*Re Van Straubenzee, Banstead v. Cooper*, [1901] 2 Ch. 779).

(b) Property specifically bequeathed is outside the rule (*Vincent v. Newcombe* (1832), You. 599; *Bethune v. Kennedy* (1835), 1 My. & Cr. 114).

(c) Freehold land is outside the rule (*Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74); as to leaseholds, before the Law of Property Act, 1925, they were within the rule (*Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312) but since the decision in *Re Brooker*, [1926] W.N. 93, a doubt has arisen as to whether they are now touched by the rule. In *Re Brooker (supra)* however there was an express trust for sale, and in *Re Berion, Vandyk v. Berion*, [1939] Ch. 200, a statutory trust for sale, and the position is obscure as to whether these decisions are applicable to an implied trust for sale under *Howe v. Dartmouth (Earl) (supra)*.

(d) A contrary intention may be shown by an intention that the property shall be enjoyed *in specie* (*Alcock v. Slopier* (1833), 2 My. & K. 699; *Re Pittcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199); but a mere power to postpone sale (*Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233) unless it was conferred for the special benefit of the tenant for life (*Re Inman, Inman v. Inman*, [1915] 1 Ch. 187)

is not sufficient to exclude the rule. A power to retain (*Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22) or to retain or convert (*Re Sheldon, Nixon v. Sheldon* (1888), 39 Ch. D. 50) is strong evidence of an intention of enjoyment *in specie*, and this is so whatever the nature of the property (*Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111).

1757. Where trustees are under a duty to convert as laid down in § 1756, then pending such conversion, they must apportion the income actually received between capital and income.^(a) In the case of wasting or unauthorized property, the tenant for life is entitled only to the income which would have been received upon an equivalent value of authorized stock.^(b) In the case of reversionary property, this is, on falling in, apportioned between capital and income by ascertaining the sum which, put out at interest at 4 *per cent.* on the day of the testator's death and accumulating at compound interest, would have produced the amount actually received: the sum so ascertained is capital, and the residue income.^(c)

Apportionment pending conversion

- (a) The rules in this para. are frequently referred to as the corollories to the *Rule in Howe v. Dartmouth (Earl)* (§ 1754 *ante*), and are necessary to determine the mode in which the trustees, pending conversion, must apportion between capital and income.
- (b) *Brown v. Gellatly* (1867), 2 Ch. App. 751.
Macdonald v. Irvine (1878), 8 Ch. D. 101.
Meyer v. Simonsen (1852), 5 De G. & Sm. 723.
Re Fawcett, Public Trustee v. Dugdale, [1940] Ch. 402.
- (c) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643.
Rozells v. Bebb, [1900] 2 Ch. 107.

1758. In the event of a trustee failing altogether to invest, he will be liable to pay to the beneficiaries interest at the rate of four *per cent. per annum* on the uninvested sum, until it is properly invested.^(a) If he invests injudiciously in authorized securities, he will be liable for the loss sustained by the beneficiaries.^(b) If he invests in unauthorized securities, the beneficiaries may (being of full age and capacity) either accept the investment, or reject it and charge

Liability of trustee for improper investments

the trustee with the money actually invested, and interest at the rate of four *per cent. per annum* from the date of the investment.^(c)

(a) *Robinson v. Robinson* (1851), 1 De G.M. & G. 247, at p. 255, *per* CRANWORTH, L.J.

(b) *Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351.
Re Turner, Barker v. Iwimey, [1897] 1 Ch. 536.

(c) *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

The non-penal rate of interest chargeable against a trustee is now four per cent., not three (*Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61). If the beneficiaries reject the investment, they have no claim under the rule set out in § 1756 *ante* (*Slade v. Chaine*, [1908] 1 Ch. 522). If they accept an unauthorized investment, it would seem that, on principle, they could not claim in respect of ultimate loss. But they have been allowed to prove such a claim in the bankruptcy of the trustee (*Re Lake, Ex parte Howe*, [1903] 1 K.B. 439).

*Trustee's
accounts*

1759. A trustee must be prepared to render, at all reasonable times, full accounts of his dealings with the trust property, and to give full information as to the condition of the trust, to all persons interested under the trust ;^(a) and he will be charged personally with the costs of any proceedings which may be rendered necessary to compel the production of such accounts or information.^(b)

(a) Even persons only contingently interested are entitled to information (*Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289).

(b) *Pearse v. Green* (1819), 1 Jac. & W. 135, *per* Lord ELDON, C.
Re Tillott, Lee v. Wilson, [1892] 1 Ch. 86.

The Public Trustee Act, 1906, s. 13 provides that any trustee or beneficiary may insist on having the accounts of the trust audited not oftener than once a year by a solicitor or accountant agreed between the parties or appointed by the Public Trustee (*Re Oddy*, [1911] 1 Ch. 532). But the Trustee Act, 1925, s. 22 (4) gives trustees the right to have their accounts audited by an independent accountant but except in special circumstances this shall not be done more than once in every three years. This apparent conflict between these provisions has not yet been judicially interpreted. The accounts of a Judicial Trustee (*ante* § 1742) are audited once a year (Judicial Trustees Act, 1896, s. 1 (6)).

1760. A trustee must not make any personal profit out of the trust ; except so far as he is expressly authorized to do so by the settlement. *No profit by trustee*

Keech v. Sandford (1726) Sel. Cas. Ch. 61.

Re Sykes, Sykes v. Sykes, [1909] 2 Ch. 241.

Where the Court appoints a corporation (other than the Public trustee) as trustee, it may authorize the corporation to charge such remuneration as it (the Court) thinks fit (Trustee Act, 1925, s. 42).

In particular, he must not—

- (i) renew for his own benefit a lease belonging to the trust ;

Keech v. Sandford, ubi supra.

- (ii) speculate or deal with the trust property with a view to personal gain ;

Rochefoucauld v. Boustead, [1898] 1 Ch. 550.

Re Davis, Davis v. Davis, [1902] 2 Ch. 314, at p. 317.

And if he does, the beneficiaries may claim either all the profit, or the return of the money employed with interest at the penal rate of five *per cent.* The severity of the rule is best realized from the fact that, in *Rochefoucauld v. Boustead, ubi supra*, the trustee was charged with a sum borrowed by him on the security of the trust property ; notwithstanding that no resort was made to the property by the lender.

- (iii) charge commission or profit costs for professional or other services ;

Matthison v. Clarke (1854), 3 Drew. 3.

Williams v. Barton, [1927] 2 Ch. 9.

The disability extends to costs paid by third parties, which must be received and carried to the credit of the trust fund (*Re Corsellis, Lawton v. Elvies* (1887), 34 Ch. D. 675) ; and the ordinary authority in a settlement only covers strictly professional charges (*Re Chalinder and Herington*, [1907] 1 Ch. 58). But the disability does not extend to the trustee's partner where it has been expressly agreed between himself and his partner that he himself shall not participate in the profits (*Clack v. Carlon* (1861), 30 L.J. (Ch.) 639 ; *Re Doody, Fisher v. Doody*, [1893] 1 Ch. 129) ; nothing short of this will suffice (*Re Gates, Arnold v. Gates*, [1933] Ch. 913 ; *Re Hill, Claremont v. Hill*, [1934] Ch. 623). Moreover, a solicitor who acts for himself and co-trustee in litigation, the costs not being thereby increased, is entitled to profit costs (*Cradock v. Piper* (1850), 1 Mac. & G. 664).

- (iv) purchase the trust property from himself without leave of the Court.

Fox v. Mackreth (1788), 2 Bro. C.C. 400; *on appeal sub nom. Mackreth v. Fox* (1791), 4 Bro. Parl. Cas. 258.

Farmer v. Dean (1863), 32 Beav. 327.

Williams v. Scott, [1900] A.C. 499.

There is no absolute rule against a trustee purchasing the interest of a beneficiary; (*Coles v. Trecothick* (1804), 9 Ves. 234.) But the transaction leaves upon the trustee the *onus* of proving its fairness (*Ex parte Lacey* (1802), 6 Ves. 625); though, if the beneficiaries reclaim the property, they are not entitled to interest on the rents or profits (*Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167). A former trustee, who has *bonâ fide* retired from the trust, may purchase the trust property (*Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244). It is sometimes said that the rule in the subs. does not apply to "bare trustees"—i.e. trustees with no active duties to perform.

Any profit which may accrue from the dealings of the trustee with the trust fund accrues to the fund.

Keech v. Sandford, *ubi supra*.

The rule that a trustee must not make any unauthorized personal profit out of his position has been extended to persons who are not strictly trustees, e.g. tenants for life (*Griffith v. Owen*, [1907] 1 Ch. 195), partners (*Bevan v. Webb*, [1905] 1 Ch. 620), agents (*Fawcett v. Whitehouse* (1829), 1 Russ. & M. 132) and members of a committee of inspection in bankruptcy (*Re Bulmer, Ex parte Greaves*, [1937] Ch. 499). But the rule must not be pushed so as to include remote profits (*Re Lewis, Lewis v. Lewis* (1910), 103 L.T. 495), or remote relationships (*Re Biss, Biss v. Biss*, [1903] 2 Ch. 40). Where a trustee holds shares in a company and in virtue of these he is appointed a director with salary, he may be held accountable for such profits (*Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65; *Re Macadam, Dallow and Moscrop v. Codd* (1945), 62 T.L.R. 48; *Re Francis, Barrett v. Fisher* (1905), 74 L.J. (Ch.) 198). The Public Trustee is, and a judicial trustee may be, entitled to remuneration for his services (Public Trustee Act, 1906, s. 9.; Judicial Trustees Act, 1896, s. 1 (5)). So also trust corporations, i.e. corporations entitled to act as trustees for the purposes of the Law of Property Act, 1925, the Settled Land Act, 1925, the Trustee Act, 1925, the administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925.

TITLE IV—POWERS OF TRUSTEES

Note.—The powers described in this Title are independent of, and in addition to, any statutory overriding powers which trustees may exercise in virtue of the provisions described in Section VII *ante*.

1761. Apart from express provision in the settlement, and subject to Title III, §§ 1756 and 1757 *ante*, a trustee has, as such, no power to sell,^(a) lease,^(b) or mortgage^(c) the trust property ; except that—

- (i) where there is a devise of a testator's whole interest in real estate to trustees, charged with the payment of debts or legacies, or other specific sum or sums, the personal representative may, in the absence of express provision for raising such sum or sums, sell or mortgage the land for the purpose of raising such sum or sums ;^(d)
- (ii) where a settlement of property as personal estate contains a power to invest money in the purchase of land, such land will, if purchased, unless the settlement otherwise provides, be held by the trustees on trust for sale ;^(e)
- (iii) where any property vested in trustees by way of security becomes irredeemable, they hold it on trust for sale ;^(f)
- (iv) *semble* : trustees may let land on a yearly tenancy, or for a short period, if such a step is necessary or desirable in the interests of the trust.^(g)

(a) *Perrins v. Bellamy*, [1899] 1 Ch. 797.

(b) *Bowes v. East London Waterworks* (1818), 3 Madd. 375 ; *affirmed* (1820), Jac. 324.

(c) *Walker v. Southall* (1887), 56 L.T. 882.

Sheffield, etc., Bdg. Soc. v. Aizlewood (1889), 44 Ch. D. 412.

(d) Administration of Estates Act, 1925, ss. 38 (2), 40.

This power has now become almost obsolete; owing to the change in the law made by s. 1 of the Land Transfer Act, 1897, and the Administration of Estates Act, 1925, ss. 2, 33, under which the personal representatives of the testator can sell to pay debts and legacies. The power given by the Law of Property Amendment Act, 1859, ss. 14 and 15 to the trustees to sell, has been repealed by the Administration of Estates Act, 1925.

(e) Law of Property Act, 1925, s. 32 (1).

(f) *Ibid.* s. 31 (1).

(g) *Naylor v. Arnitt* (1830), 1 Russ. & M. 501.

Power to

postpone sale

1762. A power to postpone sale is implied in every trust for sale of land unless a contrary intention appears (*semble*, in the settlement creating the trust).

L.P.A., 1925, s. 25. (The words in brackets are not in the section.)

*Duration of
trust for sale*

1763. When land is subject to a trust, express or implied, for sale, the trust will, so far as a purchaser thereunder is concerned, continue subsisting until the land has been conveyed (*semble*, by the trustees) to or under the direction of the persons interested in the proceeds of the sale.

L.P.A., 1925, s. 23. (The words in brackets are not in the section.)

Mode of sale

1764. Where a trustee has a trust for or power of sale, he may (subject to the provisions of the settlement) (a) sell or concur in selling the whole or any part of the property, whether subject to prior charges or not, either together or in lots, by public auction or private contract, subject to any conditions respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.^(b)

(a) Trustee Act, 1925, s. 69 (2).

(b) *Ibid.* s. 12.

1765. No sale made by a trustee can be impeached by a purchaser, in any case, on the ground that the conditions of sale were unnecessarily depreciatory ; nor by a beneficiary, unless it also appears that the alleged depreciatory character rendered the consideration for the sale inadequate. And no such sale can be impeached on such ground against the purchaser, after the execution of the conveyance ; unless it is shown that he was acting in collusion with the trustee when the contract for sale was made. *Depreciatory conditions*

Trustee Act, 1925, s. 13.

1766. A trustee having for the time being a power to dispose of land, may, subject to the provisions of the settlement,^(a) dispose of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so dispose of the minerals, with or without the said rights or powers, separately from the residue of the land.^(b) *Minerals*

(a) Trustee Act, 1925, s. 69 (2).

(b) Settled Land Act, 1925, s. 50.

Though this provision occurs in the Settled Land Act, it is brought into operation for trustees generally by s. 28 of the Law of Property Act, 1925.

1767. A trustee who is either a purchaser or a mortgagee, may purchase or lend money on property without liability for accepting a shorter title than that which a purchaser is, in the absence of a special contract, entitled to require, if, in the opinion of the Court, the title he accepted was such as a person acting with prudence and caution would have accepted.^(a) This power is subject to the terms of the settlement.^(b) *Acceptance of title*

(a) Trustee Act, 1925, s. 8 (3).

(b) *Ibid.* s. 69 (2).

Reference has been made before to the strict rights of a vendor

under a contract for sale of land (§§ 374-376). But for the provision of s. 8 of the Trustee Act, it would be possible to hold a trustee responsible if he failed to insist upon them.

Infant's land **1768.** Where a person beneficially entitled to the possession of land is a minor, the trustees of the settlement under which he holds have (unless the land is vested in a personal representative) the powers conferred on a tenant for life and the trustees by the Settled Land Act, 1925.

Settled Land Act, 1925, s. 26.

Repairs **1769.** Subject to § 1755 (ii), and to any directions in the settlement, a trustee has no power to lay out money at the expense of the beneficiaries in effecting repairs not necessary for the preservation of the trust property from forfeiture or destruction. Where repairs are necessary, the trustees must apply to the Court to apportion the cost of the repairs amongst the beneficial interests.

Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v. De Teissier, [1893] 1 Ch. 153.

Re Willis, Willis v. Willis, [1902] 1 Ch. 15.

Re Legh's Settled Estate, [1902] 2 Ch. 274.

Re Farnham's Settlement, Law Union and Crown Insurance Co. v. Hartopp, [1904] 2 Ch. 561.

On the other hand, NORTH, J., in the case of *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28, seems to have assumed that the trustees had power, at any rate with the approval of the Court, to do repairs described as "necessary" (generally). And, in the still earlier case of *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, LINDLEY, L.J. (at p. 420), suggested that, if it was "judicious" to make repairs, the Court would authorize them. But these views are somewhat at variance with the expressions of the Court in the later cases. The cost of repairs required to be done in compliance with the covenants in a lease under which the property is held, fall upon income. Where however there is a trust for sale of land, the trustees have all the powers of a tenant for life and of the trustees of a settlement under the Settled Land Act, 1925 (Law of Property Act, 1925, s. 28 (1), (2)). (See the note to § 1755 (ii) *ante*.)

Insurance **1770.** A trustee may, subject to the terms of the

settlement,^(a) insure any insurable property against loss or damage by fire to an amount (including any insurance already on foot) not exceeding three-fourths of its full value, and pay the premiums thereof out of the income of such property or of any other property subject to the same trusts, without obtaining the consent of the person or persons entitled to such income. This power does not apply to property which the trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.^(b)

(a) Trustee Act, 1925, s. 69 (2).

(b) *Ibid.* s. 19.

The position of a trustee in respect of *liability* to insure against fire has been previously noted (see *ante*, § 1755 (iii)).

1771. Subject to the express provisions of the settlement,^(a) a trustee may appoint a solicitor as his agent to receive money or other valuable consideration under the trust, by permitting him to have the custody of, and produce, a deed containing a receipt^(b) which would, under the provisions of s. 67 of the Law of Property Act, 1925, justify the person paying or transferring such money or valuable consideration, in handing it over to the solicitor of an ordinary vendor; and such person will be justified in handing it to such solicitor. And a trustee may appoint a banker or solicitor to receive and give a discharge for money payable to the trustee under a policy of assurance, by permitting him to have the custody of the policy with a receipt signed by the trustee.^(c)

*Appointment
of agents to
receive mon.*

(a) Trustee Act, 1925, s. 69 (2).

(b) *Ibid.* s. 23 (3) (a).

(c) *Ibid.* s. 23 (3) (c).

The Trustee Act, 1925, s. 23 (3) re-enacts s. 17 of the Trustee Act, 1893. It is not clear whether a trustee can authorize a solicitor to receive consideration money except by permitting him to have the custody of the deed. In *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50, at p. 59, PARKER, J. said: "It is only by permitting the solicitor

to have the custody of the deed that the statutory authority is conferred". But in view of the new wide power given by Trustee Act, 1925, s. 23 (1), the question remains open as to whether s. 23 (1) is restricted by the particular transaction envisaged by s. 23 (3). (See § 1746 *ante*.)

Receipts

1772. A trustee has power to give an effectual receipt in writing for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power; and such receipt will exonerate the person paying, transferring, or delivering the same to him (as trustee) from seeing to the application, or being answerable for any loss or misapplication, thereof.

Trustee Act, 1925, s. 14.

Though the words in brackets are not in the Act, it has been held that the corresponding section (36) of the Conveyancing Act, 1881, now repealed, does not protect a person who pays trust money to a trustee, not knowing him to be such (*Miller v. Douglas* (1886), 56 L.J. (Ch.) 91—which was, however, a case of trustees who were also executors). Unlike an executor, one of co-trustees cannot give a good discharge without the concurrence of his co-trustees (*Re Flower and Metropolitan Board of Works* (1884), 27 Ch. D. 592). The section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a trust for sale of land or under the Settled Land Act, 1925 (*ibid.* s. 14 (2)). And the section applies notwithstanding anything to the contrary in the instrument creating the trust (*ibid.* s. 14 (3)).

*Acceptance of
composition*

1773. Subject to the terms of the instrument (if any) creating the trust,^(a) two or more trustees acting together (or a sole acting trustee where, by the instrument creating the trust, a sole trustee is authorized to execute the trusts and powers thereof) may, if and as he or they may think fit, accept any composition or any security for any debt or any property claimed, and may allow time for payment of any debt, or compound for any debt, account, claim, or thing whatever relating to the trust, and for these purposes may execute such instruments and do such things as to

them or him seem expedient, without being responsible for any loss occasioned by any act or thing so done in good faith.^(b)

(a) Trustee Act, 1925, s. 69 (2).

(b) *Ibid.* s. 15.

This section has been, apparently, held to sanction even a compromise with defaulting trustees by their successors (*Re Sewell, White v. Sewell*, [1909] 1 Ch. 806, on the Act of 1883). But in doubtful cases the trustees ought to take the opinion of the Court (*Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622). The section is without prejudice to the rule that, except in the case of trust corporations, a sole trustee cannot give a good receipt for capital money (Law of Property Amendment Act, 1926, Sched.).

1774. Where trustees are in the possession of the land of a minor under the powers described in § 1768 *Income of infant's land ante*, they may, subject to the terms of the instrument under which the interest of the minor arises, apply at discretion any income arising from such land (including accumulations) for the minor's maintenance, education, or benefit, or pay thereout any money to his parent or guardian, to be applied for the same purposes. But this power only exists where the instrument under which the minor's interest arises came into operation after 1881.

• Conveyancing Act, 1881, s. 42 (4), (7), (8).

Conveyancing Act, 1911, s. 14.

The surplus income is to be invested and (subject to the power of resort) accumulated for the benefit of the minor on his attaining twenty-one, or, if the minor is a woman and marries during minority, for her separate use on marriage (her receipt being a good discharge), or, if the minor dies during minority and (being a woman) unmarried, to be held upon the trusts of the settlement, or (where the minor has taken by inheritance or is entitled to the fee simple) for the benefit of his personal representatives (Act of 1881, s. 42 (5)). This subs. has, however, been repealed by the Trustee Act, 1925. For the much wider powers exercisable by the trustees where the settlement came into operation after 1925, see §§ 1776, 1777 *post*.

1775. Every trustee appointed under §§ 1738-1740 *ante*, has, as well before as after the trust *Powers of new trustees*

property becomes vested in him, the same powers, authorities, and discretions, and may in all respects act, as if he had originally been appointed a trustee by the instrument, if any, creating the trust.

Trustee Act, 1925, s. 36 (7).

*Infant's
property*

1776. Where trustees hold property of any kind, whether vested or contingent, in trust for any person (other than a minor taking such property under an instrument coming into operation before 1926),^(a) but only if the trust carries the intermediate income, they may at their sole discretion—

(i) during the minority of such person and the continuance of his interest, pay to his parent or guardian, or otherwise apply towards his maintenance, education, or benefit, the whole or such part, if any, of the income of such property as may be reasonable, whether or not there is any other fund applicable to the same purpose or any person bound by law to provide for his maintenance or education ;^(b)

(ii) they must, if such person, on attaining his majority, has not a vested interest in such income thenceforth pay the income of the property to such person, until he attains a vested interest therein or dies, or until failure of his interest ;^(c)

but subject, in either case, to the provisions of the trust instrument, if any.^(d)

(a) Trustee Act, 1925, s. 31 (5).

(b) *Ibid.* s. 31 (1) (i).

(c) *Ibid.* s. 31 (1) (ii) (including the income from accumulations (s. 31 (2))).

(d) *Re Turner's Will Trusts, District Bank, Ltd. v. Turner*, [1937] Ch. 15.

The accumulations, subject to power of resort to supplement

income, are added to the capital of the fund and go along with it (s. 31 (2)). There are rather complicated rules as to this, which practically reproduce the judicial decisions mentioned in the footnotes to the next paragraph, as supplemented by s. 175 of the Law of Property Act, 1925, which, in the absence of provision to the contrary, provides that contingent specific and residuary gifts by will, whether of realty or personalty, carry the intermediate income; but a contingent pecuniary legacy does not normally carry the intermediate income. (*Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716; *Re Leng. Dodsworth v. Leng*, [1938] Ch. 821.)

1777. When, under a trust created after 1925, but subject to the express terms of the settlement,^(a) any person is entitled, absolutely or contingently,^(b) to capital money of the trust, whether in possession, remainder, or reversion,^(c) the trustees may, at their absolute discretion, advance to him or her any sum not exceeding one half of the presumptive or vested share of such person in the trust property, to be brought into account if that person becomes absolutely and indefeasibly entitled to a share in the trust property, but so only that such advance will not prejudice any person entitled to a prior interest, whether vested or contingent, in the money advanced, unless such latter person, being of full age, consents to the advancement.^(d) This provision only applies where the trust property consists of money or securities, or of property held on trust for sale, and the property or the money produced by the sale is not by statute or equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.^(e) *Advancement of capital*

(a) Trustee Act, 1925, s. 69 (2).

(b) Contingency covers a provision for the gift over of the beneficiary's interest in any event and it includes a double contingency (*Re Garrett, Croft v. Ruck*, [1934] Ch. 477).

(c) As there can be no true remainder or reversion in pure personalty, this expression probably covers all gifts in expectancy.

(d) Trustee Act, 1925, s. 32 (1), (3).

(e) Trustee Act, 1925, s. 32 (2).

Survival of powers

1778. Where, under a settlement coming into operation after 1881, a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being ;^(a) and, until the appointment of new trustees under such a settlement, the personal representatives or representative for the time being of a sole trustee, or of a last surviving or continuing trustee, may (subject to the terms of the settlement) exercise any power given to, or capable of being exercised by, the sole or last surviving or continuing trustee.^(b)

(a) Trustee Act, 1925, s. 18 (1).

It will be observed that the section makes no provision for merely "continuing" trustees, e.g. where one trustee has retired under the provisions of s. 39 of the Trustee Act, 1925.

(b) Trustee Act, 1925, s. 18 (2).

Apparently, the rule about survivorship only applies where the powers are conferred on the trustees as such (*Re Mainwaring, Crawford v. Forshaw*, [1891] 2 Ch. 261—where, however, the corresponding section (38) of the Conveyancing Act, 1881, was not referred to). But the tendency of the Courts is against construing powers as personal (*Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139). Presumably, the rule in s. 18 of the Trustee Act applies to statutory as well as to express powers. But a person appointed trustee could hardly disclaim a power given him as such, without disclaiming the trust.

TITLE V—RIGHTS OF TRUSTEES

1779. Trustees are entitled to be indemnified out of the trust property for all expenses and liabilities properly incurred by them in or about the execution of the trust ;^(a) and such indemnity will be a first charge on the trust property.^(b)

*Indemnity
out of trust
property*

(a) Trustee Act, 1925, s. 30 (2).

(b) *Re Turner, Wood v. Turner*, [1907] 2 Ch. 126.

The most striking illustration of this rule is to be found in the fact that costs have been allowed out of the property to trustees of a settlement which was set aside as fraudulent under the 13 Eliz. c. 5 ; they being personally innocent (*Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157).

1780. In particular—

*Specific in-
demnities*

- (i) where a trustee is liable, as such, for any rent covenant or agreement reserved by or contained in any lease, or payable under or contained in any grant made in consideration of a rent charge, or any indemnity given in respect thereof, and he satisfies all such liabilities up to the date at which he conveys the property demised or granted to a purchaser or other persons entitled to call for a conveyance thereof, he may distribute the trust estate without being liable in respect of any subsequent claim under the lease or grant ;

Trustee Act, 1925, s. 26.

The claimant may, of course, follow the trust property (see *post*, §§ 1786, 1787).

- (ii) a trustee may protect himself by advertisements in the *London Gazette* and local press, against liabilities for claims of which he has received no notice at the expiration of the period, being not less than two months, fixed

by the last of such advertisements as the latest date for the sending in of such claims.

Trustee Act, 1925, s. 27.

The protection of trustees afforded by this paragraph takes effect notwithstanding any provision to the contrary in the settlement (*ibid.* ss. 26 (2), 27 (3)).

*Personal
claim on
beneficiaries*

1781. As against beneficiaries who are entitled absolutely and are also of full age and capacity, the trustees^(a) have also a personal claim to indemnity in respect of such expenses and liabilities;^(b) and such claim will not be extinguished by the fact that the beneficiaries have parted with their interests, if the expenses and liabilities were incurred whilst the beneficiaries held such interests.^(c) But such claim may be excluded, either by express provision of the settlement, or by implication from the circumstances.^(d)

(a) This right of a trustee passes to his trustee in bankruptcy (*St. Thomas' Hospital (Governors) v. Richardson*, [1910] 1 K.B. 271).

(b) *Hardoon v. Belilias*, [1901] A.C. 118.

(c) *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

(d) *Wise v. Perpetual Trustee Co.*, [1903] A.C. 139.

It does not seem quite clear whether the liability of the beneficiaries is put on the ground of implied request or on the ground that the trustees were compelled to incur the expenses. The former appears to be the most satisfactory basis. A trustee will also be entitled to be indemnified by a beneficiary with a mere limited interest if the beneficiary has expressly or impliedly contracted to indemnify the trustee (*Fervis v. Wolferstan* (1874), L.R. 18 Eq. 18; *Fraser v. Murdoch* (1881), 6 App. Cas. 855).

*Indemnity
against co-
trustee*

1782. One of several trustees is under a duty to indemnify his co-trustees where he has received the trust money and has misappropriated it or is alone morally guilty,^(a) or where he is the solicitor to the trust and the breach of trust was committed on his advice^(b) or where he is a trustee-beneficiary in which case the breach will be made good as far as possible out of his beneficial interest.^(c)

(a) *Bahin v. Hughes* (1886), 31 Ch. D. 390.

(b) *Re Turner, Barker v. Iwimey*, [1897] 1 Ch. 536.

Re Linsley, Cattley v. West, [1904] 2 Ch. 785.

(c) *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

Of course the innocent trustee is liable to the beneficiaries (see *post*, § 1790). That is, indeed, the basis of his claim to indemnity.

1783. A trustee who has been called upon to make good a breach of trust not occasioned solely by his own fault, and not amounting to actual fraud, is entitled to contribution from his co-trustees.

Lingard v. Bromley (1812), 1 Ves. & B. 114.

Robinson v. Harkin, [1896] 2 Ch. 415.

Jackson v. Dickinson, [1903] 1 Ch. 947.

1784. Where a beneficiary has instigated, or consented in writing to, a breach of trust, his beneficial interest may, in the discretion of the Court, be impounded to recoup the trustee for any liability incurred by him through such breach; even where the beneficiary is a married woman restrained from anticipation (*ante*, §§ 1696–1700).

Trustee Act, 1925, s. 62.

Griffith v. Hughes, [1892] 3 Ch. 105.

Re Somerset, Somerset v. Poulett (Earl), [1894] 1 Ch. 231.

TITLE VI—REMEDIES FOR BREACH OF TRUST

*Against the
trust property*

1785. A beneficiary may claim the trust property, in whose hands soever it may be ; except that he cannot claim it against a *bonâ fide* purchaser for value, who has acquired the legal ownership without notice of the trust, or against persons (other than the trustee himself) taking through such purchaser.

Pilcher v. Rawlins (1872), 7 Ch. App. 259.

Taylor v. Russell, [1892] A.C. 244.

Wilkes v. Spooner, [1911] 2 K.B. 473.

The exception from the general rule stated in the paragraph is merely the result of the application of the maxim : “ where the equities are equal, the law will prevail ”. Its scope has been explained in earlier parts of the work (see §§ 1225 and 1226 *ante*). The general rule is, perhaps, the best illustration of the important principle, that the interest of the beneficiary under a trust is not merely a personal claim against the trustee, but actual property, protected against all except a limited class of persons.

*Against the
proceeds*

1786. Subject to the exception specified in § 1785, a beneficiary may also claim the proceeds of trust property, improperly converted by the trustee in breach of trust, so long as he can identify them. And if the proceeds remain in the hands or under the control of the trustee, the beneficiary will be preferred to the general creditors of the trustee, even in the latter’s bankruptcy.

Taylor v. Plumer (1815), 3 M. & S. 562.

Hopper v. Conyers (1866), L.R. 2 Eq. 549.

Re Hallett’s Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696.

Re Oatway, Hertislei v. Oatway, [1903] 2 Ch. 356.

This rule, which is one of the most striking features of the law of trusts, and, in some ways, makes a beneficiary’s interest stronger than some legal claims, is not confined strictly to trusts, but is applied to all cases of fiduciary ownership, e.g. broker and client’s money (*Hancock v. Smith* (1889) 41 Ch. D. 456), solicitor and clients’ funds (*Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433).

Very slight marks of identification have been treated as sufficient ; and probably *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, was wrongly decided. To a certain extent, as the cases show, the rule even supersedes the doctrine that " money has no ear-mark ", or, as it is more correctly put, that current coin of the realm cannot be recovered after it has passed in currency (*Miller v. Race* (1758), 1 Burr. 452 at p. 459, *per* Lord MANSFIELD, C.J.). The method of enforcing the rule is, to declare the legal owner of the proceeds a trustee for the beneficiary, with (if necessary) a consequential vesting order under § 1797 *post*.

1787. In tracing the identity of the proceeds of an improper conversion of trust property, a trustee who has paid such proceeds into a blended fund, containing also moneys of his own, will be deemed, in every case, regardless of the dates of the payment in of the trust funds and his own, to have drawn against his own money, so long as any remains in the fund.^(a) But as between rival beneficiaries under different trusts, the proceeds of whose trust property have been paid into a blended fund, the trustee will be deemed (in the absence of proof to the contrary) to have drawn against such trust proceeds in the order in which they were paid in.^(b)

Rule in Clayton's Case

- (a) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696.
Hancock v. Smith (1889), 41 Ch. D. 456.
Re Oatway, Hertslet v. Oatway, [1903] 2 Ch. 356.

- If the remaining fund exceeds the amount of the beneficiary's claim, he gets a charge upon it ; if not, he takes the whole (*Re Hallett's Estate, Knatchbull v. Hallett, ubi supra*, at p. 709). If the whole fund is exhausted by the trustee's drawings, the beneficiary will have no claim upon moneys subsequently paid in (*semble*, unless the trustee specially appropriates them to the trust) (*Roscoe (James) (Bolton), Ltd. v. Winder*, [1915] 1 Ch. 62).

- (b) *Clayton's Case* (1816), 1 Mer. 572.
Re Stenning, Wood v. Stenning, [1895] 2 Ch. 433.

The Rule in *Clayton's Case*, which applies generally to rival claimants on a mixed fund, is merely a presumption of fact, not a rule of law (*Deeley v. Lloyds Bank, Ltd.*, [1912] A.C. at p. 771, *per* Lord ATKINSON) ; and a fraudulent trustee can, if he pleases, favour one or more trust funds at the expense of others, if his intention is clear.

Against the trustee's beneficial interest

1788. A beneficiary can claim to have any beneficial interest which the trustee may himself have (whether original or acquired) in the same trust fund, impounded to satisfy a breach of trust by the trustee ; and such claim will prevail even against a *bonâ fide* purchaser of the trustee's beneficial interest (not being a purchaser for value of a legal interest without notice of the trust) who paid his money before the breach of trust was committed.

Priddy v. Rose (1817), 3 Mer. 86.

Barnett v. Sheffield (1852), 1 De G.M. & G. 371.

Cole v. Muddle (1852), 10 Hare, 186.

Doering v. Doering (1889), 42 Ch. D. 203.

The principle is that the trustee is deemed to have paid himself (*Doering v. Doering, ubi supra*). But the rule only applies where the trustee's beneficial interest is really part of the trust fund, not where it merely arises under the same instrument which contained the settlement (*Fox v. Buckley* (1876), 3 Ch. D. 508 ; *Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662) ; and only where the purchaser was not entitled to believe that the trust was at an end (*Pearce v. Bulteel*, [1916] 2 Ch. 544).

Against the trustee personally

1789. Subject to §§ 1792 and 1793 *post*, the Court will order a trustee (including a constructive trustee)^(a) to pay personally to the trust fund any loss occasioned by any breach of trust committed by him ; and such order may be enforced as a judgment debt by execution against the trustee's own property,^(b) and, if the loss is the loss of money which has been in the trustee's possession or under his control, at the discretion of the Court, by an order for attachment of the trustee's body.^(c)

(a) *Smith v. Patrick*, [1901] A.C. 282.

(b) R.S.C.O. XLII, s. 54.

As to the enforcement of judgments by execution see *ante*, § 1434 and § 1541. If a trustee is ordered to deliver up papers, and does not comply, a writ of assistance may be issued against him (*Re Taylor, Taylor v. Rawson*, [1913] W.N. 212).

(c) Debtors Act, 1869, s. 4 (3).

Debtors Act, 1878, s. 1.

Middleton v. Chichester (1871), 6 Ch. App. 152.

Before a writ of attachment can be obtained, however, certain formalities must be carefully observed (*Re Oddy, Major v. Harness*, [1906] 1 Ch. 93), including the rather difficult task of serving upon the trustee, with the notice of motion, a copy of affidavit of service thereof (O. LII, r. 4). And the money lost must actually have been under the trustee's control. A mere constructive receipt through an agent, for whom the trustee is responsible, is not enough (*Re Fewster, Herdman v. Fewster*, [1901] 1 Ch. 447). And the Court will not accept even a formal admission of the trustee as conclusive against him (*Harper v. McIntyre* (1908), 99 L.T. 191).

1790. The personal liability of co-trustees is joint *Liability of co-trustees* and several ; and acceptance of a composition from one or more of such trustees does not prevent the beneficiary proceeding against the other or others for the full amount of the loss, until the whole has been made good.

Edwards v. Hood-Barrs, [1905] 1 Ch. 20.

The right of trustees to contribution from their co-trustees has been already explained (see *ante*, § 1783).

1791. No period of limitation prescribed by the *Statutes of limitation* Limitation Act, 1939, shall apply to an action by a beneficiary under a trust, being an action (i) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy ; or (ii) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his own use.^(a) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of the Limitation Act, 1939, shall not be brought after the expiration of six years from the date on which the right of action accrued.^(b)

(a) Limitation Act, 1939, s. 19 (1).

(b) *Ibid.* s. 19 (2).

The Limitation Act, 1939, s. 19, replaces the provisions of s. 8 of the Trustee Act, 1888. Before the passing of the Act of 1888 an

express trustee could never plead lapse of time as a bar to an action by a beneficiary, however innocent the breach. It became a difficult question to determine whether any particular person held as express trustee or as a constructive trustee, and the line of demarcation in the cases is neither clear nor consistent (*Soar v. Ashwell*, [1893] 2 Q.B. 390). The Act of 1888, s. 8, permitted trustees to rely on lapse of time except where the claim was founded on fraud or where the action was to recover trust property retained by the trustee or converted to his own use. This was probably intended to allow both express and constructive trustees to rely on the statute in appropriate cases, but that they should lose its protection in the enumerated cases. But the wording of the section, especially clause 1 (A), caused great difficulty (*Re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444), and the distinction between express and constructive trustees was perpetuated (*Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533). In the Act of 1939 "Trustee" is defined by reference to the Trustee Act, 1925, and includes express and constructive trustees and personal representatives (s. 31 (1)). No right of action is deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest falls into possession (*ibid.* s. 19 (2) proviso).

*Effect of
trustee's
bankruptcy*

1792. A personal claim against a trustee founded on fraudulent breach of trust, is not extinguished by the discharge of such trustee in bankruptcy proceedings;^(a) but it is extinguished by a voluntary acceptance, duly made by the beneficiary or on his behalf, of a composition.^(b)

(a) Bankruptcy Act, 1914, s. 28.

(b) *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806.

*Relief
against
breach of
trust*

1793. A trustee who is or may be personally liable for a breach of trust may be relieved, wholly or partially, from such personal liability by the Court, if it appears to the Court that he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the direction of the Court in the matter in which he committed such breach.

Trustee Act, 1925, s. 61.

Perrins v. Bellamy, [1899] 1 Ch. 797.

Re Mackay, Griesemann v. Carr, [1911] 1 Ch. 300.

Re Allsop, Whittaker v. Bamford, [1914] 1 Ch. 7.

The Court has felt a difficulty in interpreting this enactment, which dates from 1896, inasmuch as a trustee who has acted "reasonably and honestly" is not, *prima facie*, personally liable at all (*Re Mackay, Griessemann v. Carr, ubi supra*). But the view taken is, that the section was intended to cover cases in which, though guilty of a technical breach of trust in view of the high standard of diligence demanded of a trustee, the trustee has acted as an ordinarily prudent business man would act, e.g. in following the advice of experts believed to be capable. In fact, a trustee has been excused under it who had actually paid trusts funds to the wrong person (*Re Allsop, Whittaker v. Bamford, ubi supra*).

1794. A beneficiary cannot enforce any claim against a trust fund until all obligations due from him under the settlement have been discharged.

Beneficiary must discharge liabilities to trust

Priddy v. Rose (1817), 3 Mer. 86, at p. 104, *per* GRANT, M.R.
Re Weston, Davies v. Tagari, [1900] 2 Ch. 164.

1795. A beneficiary may pursue all his remedies at once, or in any order he pleases, and continue to do so until he has recovered all that he has lost by the breach of trust.

Concurrent remedies of beneficiary

Francis v. Francis (1854), 5 De G.M. & G. 108.

The amount of judicial and literary authority for this important proposition is astonishingly small ; but its truth can hardly be doubted. Nevertheless, it may give rise to difficult questions, and even some hardship, in practice, e.g. where a purchaser from a trustee is technically effected with notice of the trust, though without personal default, and the beneficiary refuses to proceed against the trustee personally.

TITLE VII—TRANSFER OF THE TRUST ESTATE

*Conveyance
of trustee's
interest*

1796. The interest of the trustee will pass by any conveyance or event by which a similar interest belonging to the trustee beneficially, would pass ; but it will (subject to § 1791 *ante*) remain subject to the claims of the beneficiaries.

This is elementary law for which it is hard to find any direct authority. Trustees are invariably made joint owners ; and therefore, on the death of one of them, his interest passes to the survivor or survivors (*ante*, § 1712). In case of the death of a sole trustee, his interest (even though it consists of freehold real estate of inheritance) passes on his death to his personal representatives in accordance with the general law (Administration of Estates Act, 1925, s. 1). On the bankruptcy of the trustee the property which he holds on trust is not available for his creditors (Bankruptcy Act, 1914, s. 38).

*Vesting
order*

1797. Where a new trustee of land has been appointed, (§§ 1738 and 1739), or where a trustee entitled to land, actually or contingently, is under disability, out of the jurisdiction of the High Court, cannot be found, or (being a corporation) is dissolved, or there is uncertainty as to survivorship of trustees of land, or the existence of the survivor, or when a deceased trustee has left no personal representative, or wherever it is deemed expedient in the case of a trustee interested in land by way of mortgage, or where a retiring trustee is discharged under § 1740 *ante*, the Court may make an order vesting the land in any such person in any such manner and for any such estate or interest as the Court may direct, or may, instead, appoint a person to convey the land.^(a) The operation of such order, if it relates to the legal estate in land, is to convey the estate as if the order had been a conveyance by the owner of the legal estate.^(b)

(a) Trustee Act, 1925, ss. 44, 49, 50.

(b) Law of Property Act, 1925, s. 9.

There are one or two other cases included in the section, and one or two provisoes. But these are not of importance. Similar orders may be made in the cases of stocks or things in action under the provisions of s. 51 of the Trustee Act, 1925; but these will take the form of a direction to transfer, and, in the meantime, will act as "stop orders" (s. 51 (4)).

1798. There can be no involuntary alienation of the interest of a trustee ;^(a) except by his death,^(b) or by his removal by the Court, followed, if necessary, by a vesting order (*ante*, § 1797). *No liability for trustee's debts*

(a) Bankruptcy Act, 1914, s. 38 (1) (bankruptcy).

Trustee Act, 1925, s. 65 (conviction for felony).

Finch v. Winchelsea (Earl) (1715), 1 P. Wms. 277, at p. 282, *per* Lord COWPER, C.

Foley v. Burnell (1785), 1 Bro. C.C. 274, at p. 278, *per* Lord THURLOW, C.

Duncan v. Cashin (1875), L.R. 10 C.P. 554

Wright v. Redgrave (1879), 11 Ch. D. at p. 33, *per* BRAMWELL, L.J.

(execution for debt).

For some time after the passing of the Judicature Act, 1873, there was some doubt as to how the interest of the beneficiaries should be protected on a seizure of the trust property by the trustee's creditor; the old practice of applying to Chancery for an injunction against the sheriff having been forbidden by s. 24 (5) of the Act. But it is now settled, that the beneficiaries may either call upon the sheriff to interplead (*Duncan v. Cashin, ubi supra*), or may apply in the Division which issued the judgment (*Wright v. Redgrave, ubi supra*).

(b) As to this see *ante*, § 1736, n.

1799. Where for any reason there is a difficulty with regard to the transfer of, or dealing with, trust property, being land, stock (including shares in British ships) or things in action, owing to a defect of or uncertainty in title, or owing to the incapacity of a person in whom the title is vested to deal with the property, or to the absence from the country of a trustee, or to the wilful refusal of a trustee to convey when he ought to do so, the Court may, on the application of any person beneficially interested, make *Vesting orders*

a vesting order, vesting such property, or (in the case of stock) the right to transfer and receive dividends, in any such manner, and for any such estate or interest, as the Court may direct, or may make an order vesting the right to transfer such property in any person whom the Court may direct.

Trustee Act, 1925, ss. 51-55.

The provisions of the above sections are very long, and cannot be set out in detail. But it is believed that the paragraph accurately represents the result of them. It seems curious that there should, apparently, be no statutory provision of this kind on the subject of chattels corporeal.

TITLE VIII—TRANSFER OF THE BENEFICIAL INTEREST

1800. A beneficial interest in property held on trust is liable to involuntary alienation on the death, bankruptcy, or suffering of judgment of the beneficial owner, to the same extent as any other property belonging to him beneficially. *Involuntary alienation of beneficial interest*

Judgments Act, 1838, ss. 11, 13, 14.

Bankruptcy Act, 1914, s. 38.

Generally speaking, beneficial interests in trust property can only be taken in execution by the appointment of a receiver (Judgments Act, 1838, s. 13; now replaced by s. 195 of the Law of Property Act, 1925, whereby a judgment against an equitable interest in *land* operates as a registrable charge). But it would seem that chattels corporeal held in trust for the debtor solely can be seized under a Fi. Fa., at any rate with the leave of the Court (*Horsley v. Cox* (1869), 4 Ch. App. at p. 100, *per* Lord HATHERLEY, C.; *Bennett v. Powell* (1855), 3 Drew. 326, *per* KINDERSLEY, V.C.; *Stevens v. Hince* (1914), 110 L.T. 935).

1801. Subject to §§ 1791 and 1794 *ante*, a beneficiary of a trust may freely transfer his interest. *Voluntary alienation*
But every voluntary transfer of a beneficial interest in trust property will be void unless it is by testament,^(a) or by writing signed by the party granting or assigning the same.^(b)

(a) Wills Act, 1837, s. 3.

(b) Law of Property Act, 1925, s. 53 (1) (c). This is one great difference between a trust interest and an ordinary thing in action.

1802. Transfers of beneficial interests in trusts take effect in the order in which notices in writing of such transfers are received by the trustee^(a) after he has acquired control of the trust property.^(b) Notice to one of co-trustees is notice to all; ^(c) but if notice is given only to one or more of co-trustees, and the trustee or trustees who have received notice *Rule in Dearle v. Hall*

die without having, in fact, communicated such notice to their co-trustees, a subsequent *bonâ fide* transferee who, without notice of the previous transfer, gives notice to the then existing trustee or trustees, will take priority over the earlier transferee.^(d)

- (a) *Dearle v. Hall* (1828), 3 Russ. 1. (For the meaning of "trustees", see Law of Property Act, 1925, s. 137 (2)).

The rule in *Dearle v. Hall* now applies to trust interests in land, *ante*, § 1226, but only as from 1926 (Law of Property Act, 1925, s. 137 (7)).

- (b) Law of Property Act, 1925, s. 137 (1).

Re Dallas, [1904] 2 Ch. 385.

- (c) *Ward v. Duncombe*, [1893] A.C. 369.

Consequently, so long as a trustee who received the notice continues to be a trustee, the person giving notice cannot be ousted (*Ward v. Duncombe*, *ubi supra*). Trustees, however, are not deemed to have notice of an assignment of his beneficial interest by one of their number who is also a beneficiary ; unless in fact notice reaches them (*Browne v. Savage* (1859), 4 Drew. 635).

- (d) *Re Phillips' Trusts*, [1903] 1 Ch. 183.

On the other hand, a transferee who gives notice to all the trustees for the time being is safe ; even if they all die and are replaced by new trustees who, in fact, do not know of the transfer (*Re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163). Where there are successive assignments of the beneficial interest, and some of the assignees do, and some do not, give notice to all the trustees, difficult questions of priority may arise, which are probably settled by the application of the doctrine of subrogation (cf. *Re Kensington (Lord)*, *Bacon v. Ford* (1885), 29 Ch. D. 527). Trustees are not bound to give information to strangers about the state of the trust fund ; but, if they do, they are bound by their statements, and must make good any loss incurred by the enquirer on the faith of them (*Low v. Bouverie*, [1891] 3 Ch. 82).

TITLE IX—SPECIAL RULES APPLICABLE TO CHARITABLE TRUSTS

1803. Subject to any savings and exceptions provided by Act of Parliament, an assurance *inter vivos* of land (including tenements or hereditaments, of whatsoever tenure, but not including money secured on land, or other personal estate arising from or connected with land), and an assurance *inter vivos* of personal estate to be laid out in the purchase of land, to or for the benefit of any charitable use, will, if executed after 1925, be void, unless it complies with the following requirements, viz. :—

- (i) it must take effect in possession for the benefit of the charitable use immediately from the making thereof ;
- (ii) it must be without power of revocation, reservation, condition, or provision for the benefit of the assurator or of any person claiming under him, other than is provided in § 1804 ;
- (iii) it must (unless it is of stock in the public funds, or unless it is made in good faith for full and valuable consideration) be made at least twelve clear months before the death of the assurator ;
- (iv) it must, if it is stock in the public funds (unless it is made in good faith for valuable consideration) be transferred in the public books at least six clear months before the death of the assurator ;
- (v) it must (unless it is of stock in the public funds or is a registered disposition of regis-

tered land, or is one of the assurances required to be sent to the Board of Education),^(a) be sent to the offices of the Charity Commissioners within six months after its execution, or within such extended period as the Commissioners may allow.^(b)

(a) Education Act, 1921, s. 117 (which exempts gifts for educational purposes from all restrictions).

(b) Mortmain and Charitable Uses Act, 1888, s. 4; 1891, s. 3. Settled Land Act, 1925, s. 29 (4).

Valid reservations

1804. The following and similar provisions, if they reserve the same benefits to persons claiming under the assurator as to the assurator himself, are not deemed to be provisions for the benefit of the assurator within the meaning of § 1803 (ii), viz. :—

- (i) the grant or reservation of a peppercorn or other nominal rent, or of mines of minerals, or of any easement ;
- (ii) covenants or provisions as to buildings, streets, drainage, nuisances, and the like, for the use and enjoyment as well of the land assured as of any adjacent or neighbouring land ;
- (iii) a right of entry on non-payment of any such rent or on breach of any such covenant or provision.

Mortmain and Charitable Uses Act, 1888, s. 4 (4).

Charitable devises

1805. Any interest in land, or personal estate directed to be laid out in the purchase of land, may be assured to or for the benefit of any charitable use by the testament of a person dying after 4th August 1891.

Mortmain and Charitable Uses Act, 1891, ss. 5, 7, 9.

But, unless the Court or the Charity Commissioners is or are satisfied that land assured or directed to be

purchased is required for actual occupation for the purposes of the charity, the following rules apply :—

Mortmain and Charitable Uses Act, 1891, s. 8.

- (i) The land assured must be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Commissioners.

Ibid. s. 5.

- (ii) If it is not so sold, the land vests forthwith in the Official Trustee of charity lands ; and the Commissioners must take all necessary steps to effect a sale of such land with all reasonable speed.

Ibid. s. 6.

- (iii) Personal estate directed to be laid out in the purchase of land will be held to or for the benefit of the charitable uses, as if there had been no such direction.

Ibid. s. 7.

1806. All land vested or to be vested in trustees on or for charitable purposes is deemed to be settled land (*ante*, § 144.1) ; and the statute or other instrument creating the trust, or under which it is administered, will be deemed the settlement.

*Deemed
"settled
land"*

Settled Land Act, 1925, s. 29 (1).

1807. The trustees in whom land, held on or for charitable, ecclesiastical, or public trusts or purposes, is vested, though not deemed to be statutory owners (*ante*, § 144.0), have, in reference to the land, all the powers conferred by the Settled Land Act, 1925, on a tenant for life and on the trustees of a settlement (*ante*, §§ 144.0, 145.4, 145.9–146.2).

*Trustees have
powers of
tenant for
life.*

Settled Land Act, 1925, s. 29 (1).

*Definition of
"charity"*

1808. For the purposes of this Title, a charitable use means a use for the relief of poverty, the advancement of education or religion, or any other purpose deemed to be for the benefit of the community generally;^(a) even though restricted to a particular area^(b) or class.^(c)

(a) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A.C. 531.

(b) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633.

(c) But not to a class which traces its descent from named individuals (*Re Compton, Powell v. Compton*, [1945] Ch. 123).

The question as to what constitutes a "charitable" purpose has always been one of difficulty, for as it has been said, "it has that worst root of title, an ancient and obsolete statute"—viz. 43 Eliz. c. 4 (1601), in the preamble to which was set out objects which were deemed to be charitable. Though that statute was repealed by the Mortmain and Charitable Uses Act, 1888, the terms of the preamble were perpetuated in s. 13 (2) of the Act of 1888. In practice the Courts rely substantially on the preamble (see *Peterborough Royal Foxhound Show Society v. Inland Revenue Commissioners*, [1936] 2 K.B. 497), though it has never been regarded as exhaustive and the Courts have extended its terms by analogy.

BOOK IV

FAMILY LAW

SECTION I

MARRIAGE

TITLE I—CELEBRATION OF MARRIAGE

1809. Marriage in English law is the voluntary *Definition* union for life of one man and one woman to the exclusion of all others.

This was the definition by Lord Penzance based on ecclesiastical authority in Christian states (*Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. at p. 133). In *Nachimson v. Nachimson*, [1930] P. 217, where a marriage contracted in Russia was dissolved by a Soviet Court on the mere application of one of the parties without the other party having any legal right to object, the Court of Appeal held that the means of dissolving a marriage legalized by a recognized sovereign state did not invalidate the marriage in English Law. In *Baindail (otherwise Lawson) v. Baindail*, [1946] P. 122, the Court of Appeal held that where a Hindu in India marries a Hindu woman according to Hindu rites, his subsequent form of marriage in England with an Englishwoman was bigamous, the first marriage being valid though potentially bigamous. See also *Srini Vasan (otherwise Clayton) v. Srini Vasan*, [1946] P. 67, and note to § 1832 *infra*; and observations of Lord Jowrrr, C., in *Weatherley v. Weatherley*, [1947] 1 All E.R. 563, H.L.

1810. A marriage may be celebrated in England— *Forms of marriage*
(i) according to the rites of the Church of England; or

Marriage Act, 1836, s. 1.

In the case of a marriage according to the rites of the Church of England, it is not necessary that the words of the marriage service should be spoken by the parties, if their consent is sufficiently evidenced; and deaf and dumb persons may show their consent by signs (*Harrod v. Harrod* (1854), 1 K. & J. 4).

- (ii) according to the usages of the Society of Friends ("Quakers"); *or*

Marriage Act, 1823, s. 31.

Marriage Act, 1836, s. 2.

10 & 11 Vict. (1847) c. 58.

Marriage (Society of Friends) Act, 1860, s. 1.

Marriage (Society of Friends) Act, 1872, s. 1.

If both parties are not members of the Society of Friends, the marriage is not valid unless, when notice is given to the Superintendent Registrar (*post*, § 1816 (i)) a certificate of a registering officer of the Society of Friends is produced, to the effect that the marriage is authorized by the rules of the Society (Act of 1872, s. 1), which are proved by a copy purporting to be signed by the recording clerk for the time being of the Society (Act of 1860, s. 1).

- (iii) according to the usages of the Jews (where both parties are Jews); *or*,

Marriage Act, 1823, s. 31.

Marriage Act, 1836, s. 2.

10 & 11 Vict. (1847) c. 58.

- (iv) according to such form and ceremony as the parties may see fit to adopt, provided that it is solemnized in a duly registered place, in the presence of a registrar and two witnesses, and that each party shall say: "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." and "[I call upon these persons here present to witness that] I, A. B., do take thee, C. D., to be my [lawful] wedded wife" (*or* "husband").

Marriage Act, 1836, s. 20.

The Welsh equivalent of the above words may be used in places where Welsh is commonly used or preferred (Births and Deaths Registration Act, 1837, s. 23; Marriage Act, 1898, s. 14). In the case of a marriage celebrated in the presence of an "authorized person", under the Marriage Act, 1898, ss. 5, 6 (*post*, § 1812), the words in square brackets above may be omitted.

presence of, a minister in Holy Orders of the Church of England, and of two or more witnesses.^(a) A person (even though in Holy Orders) cannot validly celebrate his own marriage.^(b)

(a) Marriage Act, 1823, s. 28.

R. v. Millis (1844), 10 Cl. & Fin. 534.

The requirement of two witnesses is directory only; and a marriage has been held valid, although only one witness was present (*Wing v. Taylor* (1861), 30 L.J. (P.M. & A.) 258; (*Ussher v. Ussher*, [1912] 2 I. R. 445).

(b) *Beamish v. Beamish* (1861), 9 H.L.Cas. 274.

1812. A marriage not according to the rites of the Church of England, or the usages of the Quakers or Jews, must be celebrated, if in a registered building, in the presence of some Registrar of Births, Deaths, and Marriages, of the district in which such building is situated,^(a) or in the presence of an "authorized person" appointed under the Marriage Act, 1898;^(b) if at the office of a Superintendent Registrar of Births, Deaths, and Marriages, in the presence of him and of some Registrar of the district.^(c) In each of these cases the presence of two witnesses is also required.^(d)

*Forms of
other
marriages*

(a) Marriage Act, 1836, s. 20. (A registered building is a place of worship belonging to some religious body other than the Church of England, and duly registered according to law (*ibid.* s. 18).)

(b) S. 6. (An "authorized person" is a person duly authorized by the trustees or other governing body of the building to solemnize the marriage (*ibid.*).)

(c) Marriage Act, 1836, s. 21.

(d) *Ibid.* ss. 20, 21; Marriage Act, 1898, s. 6.

There is no statutory requirement as to the presence of any officiating minister or witnesses in the cases of Quaker and Jewish marriages.

1813. Where a marriage is to be celebrated according to the rites of the Church of England, it is necessary that within three months before the celebration of such marriage ^(a)—

*Notice before
Church of
England
marriage*

(i) public notice of such intended marriage

("publication of banns") be given audibly upon three Sundays during morning service (or, if there is no morning service, during evening service), immediately after the Second Lesson in any parish church or public chapel in which banns of matrimony may be lawfully published, which is the usual place of worship of the persons to be married or of either of them although neither of such persons dwells in the parish or chapelry,^(b) provided that seven days' notice be given to the minister of the persons' names, abodes, and period of abode ;^(c) *or*,

- (a) Marriage Act, 1823, ss. 2, 9. ("Church" includes certain chapels of the Church of England licensed for the purpose by the bishop) (Act of 1823, ss. 3, 4 ; Marriage Act, 1836, s. 26).
- (b) But under the Clergy (National Emergency Precautions) Measure, 1939 (2 & 3 Geo. 6, No. 3), or regulations thereunder, where services were entirely suspended owing to war conditions, banns could be published and marriages solemnized in any other church in the diocese designated by the Bishop.
- (c) Marriage Measure, 1930, No. 3 (Church Assembly) amending Marriage Act, 1823, ss. 2, 10. (Such person must by s. 4 of the 1930 Measure be enrolled on the church electoral roll of the area in which such parish church or public chapel is situate.)

In the cases of marriages of officers, seamen, and marines of His Majesty's Navy, the Naval Marriages Act, 1908, s. 1, makes provision for the publication of banns on board ship. The Marriage Act, 1932, authorized under certain conditions the publication of banns and the solemnization of marriages in naval, military, and air force chapels, and this act was amended by the Marriage (Members of His Majesty's Forces) Act, 1941 (4 & 5 Geo. 6, c. 47), so as to allow the marriage of members of the forces in other buildings certified as more convenient than that in which ordinarily the ceremony would have taken place and to extend the time for such ceremony during the war period over and above the statutory periods to one year. The Banns of Marriage Measure, 1934 (Church Assembly), No. 2, allows under certain conditions lay persons to publish banns.

- (ii) a special licence be obtained from the Archbishop of Canterbury for a marriage at any convenient time or place ; *or*,

25 Hen. VIII (1533), c. 21, ss. 2-4.

Marriage Act, 1823, s. 20.

Marriage Act, 1836, s. 1.

- (iii) a common licence be obtained from the Vicar General of the Archbishop of Canterbury or the Archbishop of York, or from the Chancellor or surrogate of a bishop of a diocese ; *or*,

25 Hen. VIII (1533), c. 21, s. 9.

Ecclesiastical Jurisdiction Act, 1847, s. 5.

Marriage Act, 1823, ss. 10-19, as amended by the Marriage Measure, 1930, No. 3, s. 3, whereby the former requirement of fifteen days' residence immediately preceding the grant of the licence is no longer an essential, but an alternative.

- (iv) a Superintendent Registrar's certificate be obtained, as provided in § 1816 *post*.

Marriage Act, 1836, ss. 4, 5.

Births and Deaths Registration Act, 1837, s. 36.

By the Marriage Measure, 1930, No. 3, s. 2, marriages may be solemnized on production of the Superintendent Registrar's certificate in any parish church or public chapel such as is defined in subs. (i) above.

1814. Under the Royal Marriages Act, 1772, *Royal Marriages* descendants of George II above the age of twenty-five years might marry without the consent of the Sovereign within twelve months of giving notice of the intention to the Privy Council, provided that both Houses of Parliament do not formally refuse their sanction, but no such descendant under twenty-five years of age, save the issue of princesses marrying into foreign families, may marry without the consent of the Sovereign under the Great Seal and declared in Council.

Royal Marriages Act, 1772 (12 Geo. III, c. 11).

Sussex Peerage Case (1844), 11 Cl. & Fin. 85.

See also His Majesty's Declaration of Abdication Act, 1936 (1 Edw. VIII, c. 3), whereby after the abdication King Edward VIII (the Duke of Windsor) and his issue, if any, have no title to the succession to the throne, s. 1 of the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), being construed accordingly, and the Royal Marriages Act, 1772, ceases to apply to him or his issue.

*stice before
her
arriages*

1815. When a marriage is to be celebrated not in accordance with the rites of the Church of England, it is necessary that, within three months before the celebration of such marriage, *either*—

- (i) a Superintendent Registrar's certificate be obtained, as provided in § 1816 *post*; or,

Marriage Act, 1836, s. 4.

- (ii) a Superintendent Registrar's certificate and licence be obtained, as provided in § 1817 *post*.

Marriage and Registration Act, 1856, ss. 2, 6.

*perin-
dent
gistrar's
tificate*

1816. A Superintendent Registrar's certificate is obtained as follows :—

- (i) Notice in writing of the intended marriage must be given by one of the parties to the Superintendent Registrar of the district in which the parties have had their usual place of abode and residence for not less than seven days next preceding, or, if they dwell in different districts, to the Superintendent Registrar of each district, in a prescribed form.^(a) The Superintendent Registrar must forthwith enter a copy of such notice in a book kept by him, called the Marriage Notice Book,^(b) and cause the notice to be suspended or affixed in his office, in some conspicuous place.^(c)

- (a) Marriage Act, 1836, s. 4.

Marriage and Registration Act, 1856, ss. 2, 4, and Sched. A.

- (b) Marriage Act, 1836, s. 5.

- (c) Marriage and Registration Act, 1856, s. 4.

- (ii) Such notice, or a copy thereof, must remain exhibited in the office of the Superintendent Registrar for twenty-one days.

Marriage and Registration Act, 1856, s. 4.

- (iii) After twenty-one days from the entry of

such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to § 1822 *post*) issue to the person giving such notice a certificate in the prescribed form of such notice having been given.

Marriage and Registration Act, 1856, s. 4; and Sched. B.

1817. A Superintendent Registrar's certificate and licence is obtained as follows :—

Superintendent Registrar's certificate and licence

- (i) Notice in writing of the intended marriage, stating that such marriage is to be by licence, must be given by one of the parties to the Superintendent Registrar of the district in which the party giving such notice has had his usual place of abode or residence for the space of fifteen days immediately preceding.^(a) The Superintendent Registrar must forthwith enter a copy of such notice in the Marriage Notice Book;^(b) but the notice must not be suspended in the office of the Superintendent Registrar.^(c)

(a) Marriage and Registration Act, 1856, ss. 2, 6.

(b) Marriage Act, 1836, s. 5.

(c) Marriage and Registration Act, 1856, s. 5.

- (ii) After the expiration of one whole day after the entry of such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to §§ 1818–1821 *post*) issue to the person giving such notice, a certificate of such notice having been given, and also a licence to marry.

Marriage and Registration Act, 1856, s. 9, and Sched. B.

1818. The consent of the following persons is (subject to § 1819 *post*) required for the marriage of any minor, not being a widow or widower :—

Consent to marriage

- (i) both parents, if living together ;

- (ii) if the parents are divorced or separated by order of Court or agreement, the parent in whose favour a custody order is made or who is given custody by the agreement ;
- (iii) to the parent deserted by the other ;
- (iv) if both parents have been deprived of custody by the Court, the custodian appointed by the Court ;
- (v) if one parent is dead, the surviving parent ;
- (vi) if a guardian has been appointed by a deceased parent, either or both of the surviving parent or the guardian ;
- (vii) if both parents are dead, the guardian or guardians appointed by the deceased parents or by the Court.

Guardianship of Infants Act, 1925, ss. 4, 5, 6, 9, and Sched. (amending Marriage Act, 1823, s. 16, and Guardianship of Infants Act, 1886, s. 5).

In the case of illegitimate minors the consent required is of the mother or the custodian appointed by the Court, or, if the mother is dead, the guardian appointed by her.

*Consent by
Court*

1819. If the consent of any person whose consent to the marriage is required under § 1818 cannot be obtained by reason of absence, or inaccessibility, or disability, the appropriate ecclesiastical authority or the Registrar-General or the Court may consent to the marriage. If the person whose consent is required refuses his consent the Court may give its consent notwithstanding.

Guardianship of Infants Act, 1925, s. 30, amending the Marriage Act, 1823, s. 17, and the Guardianship of Infants Act, 1886.

The absence of consent does not make the marriage void (*R. v. Birmingham (Inhabitants)* (1828), 8 B. & C. 29 ; and see *Holmes v. Simmons* (1868), L.R. 1 P. & D. at p. 528 ; *Prowse v. Spurway and Bowley* (1877), 46 L.J.(P.) 49 ; *Plummer v. Plummer*, [1917] P. 163. But a forfeiture of interest in property by the Court might follow if the

age of a minor is procured without consent by the false oath or statement of one of the parties (Marriage Act, 1823, ss. 14, 23 ; Marriage and Registration Act, 1856, s. 19 ; see *Re Rutter, Donald-Rutter*, [1907] 2 Ch. 592).

820. When either of the parties to the intended marriage is a minor, not being a widow or widower, a person applying for such a licence as is described in § 1813 (iii) *ante*, or for such certificate or certificate and licence as is referred in §§ 1816, 1817 *ante*, to state on oath, in the case of a licence under § 1813 (iii), or make a solemn declaration in the case of a certificate, or certificate and licence, under §§ 1816, 1817, that the consent of such person (if any) whose consent is required under § 1818 *ante*, has been obtained, or that there is no such person. No such licence, certificate, or certificate and licence may be issued unless such statement on oath or declaration (as the case may be) has been made.

Evidence of consent

Marriage Act, 1823, s. 14.

Marriage and Registration Act, 1856, s. 2.

821. A person whose consent is required under § 18 *ante*, may—

Forbidding the marriage

- (i) at the time of the publication of the banns of the marriage, and in the church where such banns are published, openly declare his dissent from such marriage. The effect of such declaration is to make the publication of banns void ;

Marriage Act, 1823, s. 8.

- (ii) forbid the issue of the Superintendent Registrar's certificate, or certificate and licence, referred to in §§ 1816, 1817 *ante*, by making an entry in a prescribed form to that effect in the Marriage Notice Book, before the issue of the Superintendent Registrar's certificate.

No such certificate, or certificate and licence, may be issued after such prohibition ; and such certificate, or certificate and licence, if issued after such prohibition, is void ;

Marriage Act, 1836, ss. 9, 10, 40.

- (iii) enter a caveat against the issue of such licence as is described in § 1813 (iii), or such certificate or licence as is referred to in §§ 1816, 1817 *ante*. After the entry of such caveat, no licence, certificate, or certificate and licence, may be issued until such caveat has been withdrawn or disposed of.

Marriage Act, 1823, s. 11.

Marriage Act, 1836, s. 13.

*Place of
Church of
England
marriage*

1822. Subject to the provisions of the Marriage (Members of His Majesty's Forces) Act, 1941 (see § 1813 *ante*, note), a marriage celebrated in accordance with the rites of the Church of England must be celebrated—

- (i) if with publication of banns, in the church or one of the churches in which the banns have been published ;

Marriage Act, 1823, s. 2.

Marriage Measure, 1930, No. 3, s. 1.

- (ii) if a special licence under § 1813 (ii) *ante*, has been obtained, in the place specified in such licence ;

Marriage Act, 1823, s. 20.

Marriage Act, 1836, s. 1.

- (iii) if a common licence under § 1813 (iii) *ante*, has been obtained, in the church specified in the licence, which must be any parish church or public chapel which is the usual place of worship of the persons to be married or of either of them, although neither of such

persons dwells in the parish or chapelry to which such parish church or public chapel belongs.

Marriage Measure, 1930, No. 3, ss. 1, 5, amending the Marriage Act, 1836, s. 2, but still requiring the essential of fifteen days' residence immediately before the grant of the licence laid down by the Marriage Act, 1923, s. 10, in the case of persons who wish to marry in their parish church though it is not their usual place of worship.

- (iv) if a Superintendent Registrar's certificate, under § 1813 (iv) *ante*, has been obtained, in the church specified in such certificate.

Marriage Act, 1836, s. 42.

1823. A marriage not celebrated in accordance with the rites of the Church of England must be celebrated in the place specified in the notice and certificate described in §§ 1816, 1817 *ante*.^(a) Such place must (except in the case of marriages celebrated in accordance with the usages of the Quakers or Jews) be a registered building, or the office of the Superintendent Registrar.^(b)

*Place of
other
marriages*

(a) Marriage Act, 1836, s. 42.

(b) *Ibid.*, ss. 20, 21.

As a rule, the registered building must be in the district in which one of the parties has dwelt for the required time. But there are exceptions (Marriage Act, 1840, ss. 1, 2).

1824. By the Marriage Act, 1939, where one party resides in England and the other in Scotland facilities are provided as to notices and other formalities which bring into conformity the marriage laws of England and Scotland governing the celebration of marriages in England and regular marriages in Scotland.

*Parties
resident in
England and
Scotland*

Marriage Act, 1939 (2 & 3 Geo. VI, c. 33).

1825. Every marriage, unless a special licence has been obtained as mentioned in § 1813 (ii) *ante*, must be celebrated with open doors,^(a) between the hours of eight in the morning and six in the afternoon.^(b)

*Canonical
hours*

- (a) Marriage Act, 1836, ss. 1, 20.
Marriage Act, 1886, s. 1 (1).
- (b) Marriage (Extension of Hours) Act, 1934, s. 1, extending the pre-existing hour of 3 to 6 P.M., and applying equally to marriages solemnized abroad under the Foreign Marriage Act, 1892 (see 1826 (iv) *post*).

*Marriages
celebrated
abroad*

1826. A marriage, for the purposes of English law, may be validly celebrated out of England in any of the following ways :—

- (i) according to the form recognized as valid by the law of the country in which the marriage takes place ;

Dalrymple v. Dalrymple (1811), 2 Hag. Con. 54.

Swift v. Kelly (1835), 3 Knapp, 257, H.L.

Simonin v. Mallac (1860), 2 Sw. & Tr. 67.

Swift v. A.-G. for Ireland, [1912] A.C. 276.

Apt (otherwise Magnus) v. Apt, [1947] 1 All E.R. 620 (proxy marriage in Buenos Aires of Englishwoman while resident and domiciled in England declared valid in Argentinian and therefore English law).

- (ii) according to the form recognized as valid by the law of the State to which the parties belong, in cases where the marriage is celebrated either (a) in a place in which the parties enjoy the privilege of ex-territoriality,^(a) or (b) in a place in which the use of the form recognized by the local law is impossible ;^(b)

- (a) *R. v. Brampton* (1808), 10 East, 282 (marriage of a British soldier serving in St. Domingo) ;

Phillips v. Phillips (1921), 38 T.L.R. 150 (marriage in church mission hall in China) ; *Wolfenden v. Wolfenden* (1945), 62 T.L.R. 10 (valid marriage in mission church in China in English common law).

- (b) *Ruding v. Smith* (1821), 2 Hag. Con. 371.

Dicey, *Conflict of Laws*, (5th edn.) p. 733.

The "form recognized as valid by the law of the State to which the parties belong" includes, in the case of British subjects, the form recognized as valid by the English common law before Lord Hardwicke's Marriage Act of 1753, i.e. a religious ceremony performed by a minister of the Church of England or of the Roman Catholic or some episcopal Church (*Limerick (Countess) v. Limerick (Earl)*

(1863), 32 L.J. (P.M. & A.) 92. But see *Catherwood v. Gaslon* (1844), 13 M. & W. 261).

- (iii) by a chaplain or officer or some other person officiating under the orders of the commanding officer of a British army, within the lines of such army serving abroad ;

Foreign Marriage Act, 1892, s. 22.

- (iv) according to the provisions of the Foreign Marriage Act, 1892, in cases where the marriage is celebrated outside the United Kingdom, between persons of whom one at least is a British subject.

Foreign Marriage Act, 1892, ss. 1-21. (Under this Act, a marriage may be celebrated either in accordance with the rites of the Church of England, or according to such form and ceremony as the parties may see fit to adopt, provided that they use the words set out in § 1810 (iv) *ante*, including those in square brackets, but omitting the word "do" (s. 8 (3)).) Whatever form is adopted, a Marriage Officer (such as a British ambassador or consul, or the Commander of one of His Majesty's ships), and two witnesses, must be present. But another person may celebrate the marriage (s. 8 (2)). Notice of the intended marriage, similar to that required by § 1816 (i) *ante*, must be given to the Marriage Officer, not less than fourteen days, or more than three months, before the marriage (ss. 2, 6, 8 (1)). As regards consents of parents and guardians to the marriage of minors abroad, provisions similar to those of §§ 1818, 1819 *ante* apply (s. 4). The marriage must be celebrated at the official house of the Marriage Officer, or on board one of His Majesty's ships on a foreign station (ss. 8 (2), 13 (2)), in the former case with open doors, and between the hours of eight in the forenoon and six in the afternoon (see § 1825, note (b), *ante*).

The Merchant Shipping Act, 1894, ss. 240 (6), 253 (1) (viii), appears to contemplate the possibility of a marriage of necessity being celebrated on board a British merchant ship (see *Latey on Divorce* (13th edn.), p. 30 ; cf. *Du Moulin v. Druitt* (1860), 13 I.C.L.R. 212.

1827. Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence. *Presumption of validity*

These words, adopted and approved by Lord MERRIVALE in *Spivack v. Spivack*, [1930] W.N. 46, were used by BARGRAVE DEANE, J., in Halsbury's *Laws of England*. Compare the Scottish doctrine of "habit and repute", and the legal presumption of a lawful marriage after prolonged cohabitation, upheld in *De Thoren v. A.-G.* (1876), 1 App. Cas. 686.

TITLE II—INVALID AND VOIDABLE MARRIAGES

1828. A marriage celebrated in England is void *Informality* unless celebrated substantially in one of the ways *generally* specified in Book IV, Title I, *ante*.

1829. A marriage purporting to be celebrated in *In Church* accordance with the rites of the Church of England *of England* is void— *marriages*

- (i) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated in any place other than such church as is described in § 1822 (i), (iii), (iv) *ante* ;
- (ii) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated without due publication of banns, or such licence or certificate as is described in § 1813 *ante* ;
- (iii) if, to the knowledge of both parties, the marriage is celebrated by a person not in Holy Orders.

Marriage Act, 1823, s. 22.

Marriage Act, 1836, s. 42.

Marriage Measure, 1930, No. 3, ss. 1, 5.

The publication of banns under a name known to both parties to be false in any material particular, with the object of concealing identity, avoids the marriage (*Tongue v. Tongue* (1836), 1 Moo. P.C.C. 90 (concealment of Christian name); *Midgeley v. Wood* (1859), 30 L.J. (P.M. & A.) 57 (Christian name only); *Wormald v. Neale and Wormald* (1868), 19 L.T. 93 (false surname); *Chipchase v. Chipchase*, [1942] P. 37 (false surname)). If the defect is known to one party only, the marriage is valid (*R. v. Wroxton (Inhabitants)* (1833), 4 B. & Ad. 640 (false name); *Gompertz v. Kensit* (1872), L.R. 13 Eq. 369 (omission of Christian names); *Templeton v.*

Tyree (1872), L.R. 2 P. & D. 420 (incorrect ages); *Greaves v. Greaves* (1872), L.R. 2 P. & D. 423 (no banns or licence)). A misdescription in a licence (at any rate unless fraudulent) will not invalidate a marriage (*Cope v. Burt* (1809), 1 Hag. Con. 434 (assumed names); *Ewing v. Wheatley* (1814), 2 Hag. Con. 175; *Haswell v. Haswell and Gilbert* (1881), 51 L.J. (P.) 15) (two additional Christian names put in by mistake)). In *Cope v. Burt*, *ubi supra* at p. 439, and in *Lane v. Goodwin* (1843), 4 Q.B. at p. 366, the opinion was expressed that a licence might not be valid if obtained for one person with the intention that it should be used for another. A marriage celebrated by a person not in Holy Orders, but supposed by the parties to be in Holy Orders, is probably valid. But the point is doubtful (*Hawke (Lord) v. Corri* (1820), 2 Hag. Con. at p. 288; *R. v. Ellis* (1888), 16 Cox, C.C., at p. 471; Marriages Validation Act, 1888).

In other marriages

1830. A marriage purporting to be celebrated in one of the ways described in § 1810 *ante*, other than a marriage according to the rites of the Church of England, is void—

- (i) if, to the knowledge of both parties, it is celebrated in some place other than the place specified in the notice and certificate described in §§ 1816 and 1817 *ante*;
- (ii) if, to the knowledge of both parties, it is celebrated without such notice as is described in §§ 1816 and 1817 *ante*, or without such certificate and licence (where a licence is necessary) as is therein described;
- (iii) if, to the knowledge of both parties, the marriage (not being a marriage according to the usages of the Quakers or Jews), is celebrated without the presence of such Registrar, Superintendent Registrar, or “authorized person”, as is required under § 1812 *ante*.

Marriage Act, 1836, s. 42.

Marriage Act, 1898, ss. 6 (3), 15.

A misdescription in a notice leading to the Superintendent Registrar's certificate or licence does not make the marriage void; even though the misdescription be known to both parties, and fraudulent (*Holmes v. Simmons* (1868), L.R. 1 P. & D. 523; *Prowse v. Spurway*

and *Bowley* (1877), 46 L.J. (P.) 49; *Re Rutter, Donaldson v. Rutter*, [1907] 2 Ch. 592 (surname false to the knowledge of both parties)). No question as to the correctness of the statement of the dwelling of either of the parties in the notice can be raised after the marriage has been celebrated (Marriage and Registration Act, 1856, s. 17).

1831. A marriage is void if either of the parties was, at the date thereof, a lunatic who had been so found by inquisition. or whose person and estate had been committed to the care and custody of particular trustees; unless he had, before such marriage, been declared sane by a competent Court, or by such trustees or the majority of them. *Lunacy*

Marriage of Lunatics Act, 1811.

Turner v. Meyers (1808), 1 Hag. Con. at p. 417.

1832. A so-called marriage is void if, at the date thereof, either party was lawfully married to some other person; even if one or both of the parties was ignorant of the previous marriage, or believed that it had been dissolved by death or otherwise. *Previous marriage*

Re Wilson's Trusts (1865), L.R. 1 Eq. 247; affirmed *sub nom. Shavo v. Gould* (1868), L.R. 3 H.L. 55.

The general principle that English law does not recognize as valid a polygamous or potentially bigamous union must be qualified to some extent. The Judicial Committee of the Privy Council has often recognized as valid polygamous marriages in states where such unions are lawful and given effect to legal consequences such as legitimacy and rights to property arising from such unions. See note to § 1809 *supra*—*Baindail (otherwise Lawson) v. Baindail*, and also Halsbury's *Laws of England* (Hailsham edition), Vol. VI, § 340, p. 284; and Dicey's *Conflict of Laws* (5th edn.) p. 282, note (k). But a foreigner, or a British subject domiciled abroad, who has duly contracted a marriage in England according to English law, cannot thereafter dispute the validity of the marriage on the ground of any personal incapacity imposed by the law of his domicile (*Chetti v. Chetti*, [1909] P. 67; *Brook v. Brook* (1861), 9 H.L. Cas. 193). The decision in *R. v. Naguib*, [1917] 1 K.B. 359, merely decided that, as there was no proof of a previous marriage in Egypt by the Mahomedan defendant on which he could rely to avoid a marriage in England with an Englishwoman, that defence failed, and left open the question whether the Court could recognize the Egyptian marriage if it had been proved.

*Prohibited
degrees*

1833. A so-called marriage is void—

- (i) if the parties to it are related by blood to one another lineally, or as brother and sister, uncle and niece, aunt and nephew ;
- (ii) if (subject to the exceptions in § 1834 *post*) one of the parties is related, through a former wife or husband, to the other in one of the degrees or ways specified in (i).

28 Hen. VIII (1535) c. 7, ss. 7, 11.

28 Hen. VIII (1536) c. 16, s. 2.

32 Hen. VIII (1540) c. 38.

1 Eliz. (1558) c. 1, s. 3.

Marriage Act, 1835, s. 2.

R. v. Chadwick (1848), 11 Q.B. 205.

Re Wood, Ex parte Naden (1874), 9 Ch. App. 670.

Relationship of the half-blood has in this respect the same effect as relationship of the whole blood ;^(a) and illegitimate blood relationship the same as that of legitimate.^(b) But illicit carnal connexion does not constitute affinity.^(c)

(a) *Mette v. Mette* (1859), 28 L.J. (P. & M.) 117 (half-sister of wife).
R. v. Brighton (Inhabitants) (1861), 1 B. & S. 447 (daughter of illegitimate half-sister of wife).

(b) *R. v. St. Giles in the Fields (Inhabitants)* (1848), 11 Q.B. 173, 244.
R. v. Chadwick, ubi supra.
R. v. Brighton (Inhabitants), ubi supra.

(c) *Wing v. Taylor* (1861), 30 L.J. (P.M. & A.) 258.

Before the Marriage Act of 1835, such marriages were merely voidable by sentence of the ecclesiastical court, which could only be pronounced during the lifetime of both parties (Marriage Act, 1835).

*Statutory
exceptions
from
prohibited
degrees*

1834. So-called marriages between persons within the prohibited degrees annexed to the Book of Common Prayer are void, save for the following exceptions provided by statute, which are, for civil purposes, valid—

- (i) a man and his deceased wife's sister or half-sister ;

Deceased Wife's Sister's Marriage Act, 1907, ss. 1, 5.

- (ii) a woman and her deceased husband's brother or half-brother ;

Deceased Brother's Widow's Marriage Act, 1921, s. 1.

- (iii) a man and

- (a) his deceased wife's brother's daughter (niece by marriage) ;
- (b) his deceased wife's sister's daughter (niece by marriage) ;
- (c) his father's deceased brother's widow (aunt by marriage) ;
- (d) his mother's deceased brother's widow (aunt by marriage) ;
- (e) his deceased wife's father's sister (aunt by marriage) ;
- (f) his deceased wife's mother's sister (aunt by marriage) ;
- (g) his brother's deceased son's widow (niece by marriage) ;
- (h) his sister's deceased son's widow (niece by marriage).

Marriage (Prohibited Degrees of Relationship) Act, 1931, s. 1.

1835. In none of the above-stated relationships *Marriage of Divorced Persons* is it open to a man to marry a woman whose marriage has been dissolved if the former spouse is alive. Likewise a man may not marry the sister or half-sister of the wife whom he has divorced or who has divorced him during the former wife's lifetime, or the former wife of his brother or half-brother whose marriage has been judicially dissolved, during the brother's life-time.

Judicature Act, 1925, s. 184, as amended by Marriage (Prohibited Degrees of Relationship) Act, 1931, s. 2.

1836. The so-called marriage of a person under *Age of capacity* the age of sixteen years is void, if contracted after May 10, 1929.

Age of Marriage Act, 1929, s. 1.

Before the date mentioned, the ages for a valid marriage were fourteen for a male and twelve for a female. Any marriage of a boy or girl under those respective ages was voidable.

Insanity

1837. A marriage will be declared void by the Court on the ground of the insanity of either of the parties, existing at the time of the marriage, if the insanity was such as to prevent the insane party from understanding the nature of the contract of marriage and the duties and responsibilities which it creates.^(a) The sane party, as well as the insane party through a guardian *ad litem*, may apply to the Court to have the marriage declared void on this ground.^(b)

(a) *Durham v. Durham* (1885), 10 P.D. 80.

Jackson v. Jackson, [1908] P. 308.

(b) *Durham v. Durham*, *ubi supra*

Hunter v. Edney (1885), 10 P.D. 93.

Turner v. Meyers (1808), 1 Hag. Con. 414.

Hancock v. Peaty (1867), L.R. 1 P.&D. 335.

} (petitions by sane party).

} (petitions by insane party).

After 1937, unsoundness of mind, mental deficiency, and recurrent fits of insanity or epilepsy, if existing at the date of the marriage, became grounds for declaring the marriage void, but only subject to the conditions set out in § 1840 (Matrimonial Causes Act, 1937, s. 7 (1) (b)). See *Smith v. Smith (otherwise Hand)*, [1940] P. 179.

Want of consent

1838. A marriage may be declared void by the Court on the ground that one of the parties went through the form of marriage without freely consenting thereto. *Semble*: only the party whose want of consent is alleged may apply to have the marriage declared void on this ground.

Scott v. Sebright (1886), 12 P.D. 21 (duress and undue influence)

Ford v. Stier, [1896] P. 1 (parental influence; petitioner thought she was going through a betrothal only)

Szapira v. Szapira (1898), *Times*, Dec. 22; subsequent proceedings (1899), *Times*, Jan. 24

Hall v. Hall (1908), 24 T.L.R. 756 (erroneous view of ceremony)

Valier v. Valier (1925), 133 L.T. 830 (the same)

Neuman v. Neuman (1926), *Times*, Oct. 15 (supposed preliminary to marriage)

Kelly (otherwise Hyams) v. Kelly (1932), 49 T.L.R. 00 (ceremony regarded as betrothal)

} (marriage held void).

INVALID AND VOIDABLE MARRIAGES 1027

Sullivan v. Sullivan (1818), 2 Hag. Con. 238 }
Cooper v. Crane, [1891] P. 369 (respondent had } (marriage held valid).
 threatened suicide if petitioner would not marry him)

1839. Where there is free consent to a marriage, *Fraud and mistake*
 no fraud or mistake inducing the consent is a ground
 for declaring the marriage void, unless there has
 been unlawful publication of banns (*ante*, § 1829).

Wakefield v. Mackay (1807), 1 Phillim. at p. 137.

Pouget v. Tomkins (1812), 2 Hag. Con. 142 (false and fraudulent
 publication of banns, nullity).

Ewing v. Wheatley (1814), 2 Hag. Con. 175, at p. 183 (question of
 identity of parties, nullity refused).

Sullivan v. Sullivan (1818), 2 Hag. Con. at p. 248.

Moss v. Moss, [1897] P. 263 (fraudulent concealment of pregnancy;
 decree refused. See now, however, § 1840).

1840. In 1938, the following additional grounds *Further grounds of nullity*
 for annulling a marriage came into operation, viz. :

- (i) that the respondent was, at the date of the
 marriage, suffering from venereal disease in a
 communicable form ;
- (ii) that the respondent was, at the date of the
 marriage, pregnant by some person other than
 the petitioner.^(a)

But the Court cannot grant a decree of nullity on
 either of these grounds, unless it is satisfied (*a*) that
 the petitioner was, at the time of the marriage, ignorant
 of the facts alleged, (*b*) that the proceedings were
 instituted within a year from the date of the marriage,
 and (*c*) that marital intercourse with the consent of the
 petitioner has not taken place since the discovery by
 the petitioner of the existence of the grounds for a
 decree.

Matrimonial Causes Act, 1937, s. 7.

- (a) *Jackson v. Jackson* (*otherwise Prudom*), [1939] P. 172.

1841. A marriage may be annulled, at the instance *Impotence*
 of one of the parties, on the ground of the incapacity,
 existing at the time of the marriage, on the part of

the other, to have sexual intercourse with the petitioner ;^(a) and the Court may, in its discretion, annul such marriage even on the application of an impotent party.^(b) Such marriages are voidable only on the petition of one of the parties, and remain valid until annulled by the Court acting in its matrimonial jurisdiction ;^(c) but, on a decree absolute of nullity, the order pronounces the marriage to be and to have been absolutely null and void, and that the said petitioner was and is free from all bond of marriage with the said respondent.^(d)

- (a) *M. (otherwise D.) v. D.* (1885), 10 P.D. 75. It is not necessary, as formerly, to allege or prove that the impediment is "incurable by art or skill"; *Brown v. Brown* (1828), 1 Hag. Ecc. 523; *L. v. L. (falsely called W.)* (1882), 7 P.D. 16. See *F. v. P. (falsely called F.)* (1896), 75 L.T. 192; *Dickinson v. Dickinson (otherwise Phillips)*, [1913] P. at p. 204. A party may be capable generally but incapable *quoad hunc vel hanc*; and the other party will still be entitled to a decree (*G. (otherwise H.) v. G.*, [1921] P. 399). Sterility *per se* is not a ground for nullity; *B——n v. B——n* (1854), 1 Ecc. & Ad. 248; *L—— v. L—— (otherwise D——)* (1922), 38 T.L.R. 697. But where a man by an operation before marriage rendered himself sterile, the marriage was annulled on the ground of his incapacity: *F. v. F.* (1947), (*Times*, May 24th). The decision of the House of Lords that the Court has no power to hold proceedings of this kind *in camera*, merely in the interests of decency (*Scott v. Scott*, [1913] A.C. 417), has been qualified by the Judicature Act, 1925, s. 4, which provides that evidence on the question of sexual capacity must be heard *in camera*.

- (b) *A. v. A. (sued as B.)* (1885), 19 L.R. Ir. 403.
G. v. G. (falsely called K.) (1908), 25 T.L.R. 328.
Davies v. Davies (otherwise Mason), [1935] P. 58.

But see *Norton v. Seton (falsely called Norton)* (1819), 3 Phill. 147; *Lewis (falsely called Hayward) v. Hayward* (1866), 35 L.J.P. & M. 105; *Halfen (otherwise Boddington) v. Boddington* (1881), 6 P.D. 13; *Turner v. Thompson* (1888), 13 P.D. 37; *Dickinson v. Dickinson (otherwise Phillips)*, *ubi supra*. The validity of the marriage cannot be impeached, after the death of either party, on the ground of impotence (*A. v. B.* (1868), L.R. 1 P. & D. 559). Yet it may be so impeached by a third person on some other ground of invalidity.

- (c) *Faremonth v. Watson* (1811), 1 Phillim. 355 (incestuous marriage).
Brocning v. Reane (1812), 2 Phillim. 69 (mental incapacity).
Elliott v. Gurr (1812), 2 Phillim. 16.
A. v. B., ubi supra.

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- (d) Though the effect of a decree absolute of nullity for impotence is to wipe out the marriage retrospectively (*Newbould v. A.-G.*, [1931] P. 75 (a legitimacy issue)), it is not necessarily *void ab initio* for all purposes (*Dodworth v. Dale*, [1936] 2 K.B. 503, an Inland Revenue case, and *Fowke v. Fowke* [1938], Ch. 774 (deed of separation between the spouses binding though marriage annulled for impotence)). After 1937, a child born of a marriage afterwards declared void on the ground of pregnancy, insanity, or venereal disease (see § 1840) will nevertheless be legitimate (Matrimonial Causes Act, 1937, s. 7 (2)).

1842. Since 1937, a marriage is voidable on the ground that it has not been consummated owing to the wilful refusal of the respondent to consummate it.

*Wilful
refusal to
consummate*

Matrimonial Causes Act, 1937, s. 7 (1) (a).

Thus statutory effect is given to the decision in *Dickinson v. Dickinson* (otherwise *Phillips*), [1913] P. 198, which was overruled by the C.A. in *Napier v. Napier*, [1915] P. 184. In *Cowen v. Cowen*, [1946] P. 36 the Court of Appeal held that if one spouse refuses intercourse always except with the use of a contraceptive contrary to the wish of the other spouse this constitutes wilful refusal; but the aggrieved spouse must prove he has done all possible to overcome the other's reluctance, or he may be held to have acquiesced: *Baxter v. Baxter*, [1947] 1 All E.R. 387, C.A.

1843. The Court may refuse to annul a marriage on the ground of such incapacity as is mentioned in § 1841 *ante*, if the petition is insincere.^(a) Delay in presenting a petition for annulment, if not satisfactorily explained, may be evidence of insincerity; but is not in itself a ground for refusing relief,^(b) nor is the petitioner's passion for or sexual intercourse with a third person.^(c)

*Grievance
must be
genuine*

- (a) *Anon.* (1857), Dea. & Sw. 295.
M. (falsely called C.) v. C. (1872), L.R. 2 P. & D. 414.
W. (falsely called R.) v. R. (1876), 1 P.D. 405.
G. v. M. (1885), 10 App. Cas. 171.
Nash v. Nash, [1940] P. 60.
- (b) *Castleden v. Castleden* (1861), 9 H.L.Cas. 186.
M. (otherwise D.) v. D. (1885), 10 P.D. 75.
T. v. T. (otherwise J.) (1931), 47 T.L.R. 629.
- (c) *M. (otherwise D.) v. D.* (1885), 10 P.D. 75.
S. (otherwise G.) v. S., [1907] P. 224.

TITLE III—JACTITATION OF MARRIAGE

Grounds for

1844. If a person persistently and falsely alleges that he or she is married to another, the latter may, in a suit of jactitation of marriage, obtain a decree forbidding the former to make such allegations, and pronouncing perpetual silence by the respondent on the subject. No such decree will be granted in favour of a person who has at any time acquiesced in the making of such allegations by the other party.

Hawke (Lord) v. Corri (1820), 2 Hag. Con. 280.

Campbell v. Corley, Ex parte Campbell (1862), 31 L.J. (P.M. & A.) 60.

Thompson v. Rourke, [1893] P. 11; *on appeal* 70.

Goldstone v. Smith (otherwise Goldstone) (1922), 38 T.L.R. 403.

A judgment in such action is not conclusive for or against the fact of the marriage in proceedings between other parties (e.g. in an indictment for bigamy); and it is not clear that it would be conclusive even between the parties (*Duchess of Kingston's Case* (1776), 20 Howell St. T. at pp. 542-3; 2 Smith L.C. (12th edn.) at pp. 760-1, *per* DE GREY, C.J.). *Quære*: Would a suit for jactitation lie in a case where what one of the parties really seeks is a declaration by the Court that his marriage is valid or invalid? It has been suggested that this method of procedure, even if it were by way of a legal fiction, would enable the Court to make such a declaration of validity of marriage as it has at present no inherent power to pronounce. See *De Gasquet James (Countess) v. Mecklenburg-Schwerin (Duke)*, [1914] P. 53, *per* Sir S. EVANS, P.

TITLE IV—RIGHTS AND DUTIES ARISING OUT OF MARRIAGE

1845. Husband and wife are under a duty to each other to cohabit,^(a) unless they have been judicially separated or have mutually agreed to separate,^(b) or unless one party has deprived himself of the rights to require cohabitation by committing a matrimonial offence,^(c) or has otherwise so acted as to make it unreasonable that the other party should be required to cohabit.^(d) *Cohabitation*

- (a) *Evans v. Evans* (1790), 1 Hag. Con. at p. 36.
Wilkinson v. Wilkinson (1871), L.R. 12 Eq. 604.

Cohabitation does not necessarily involve sexual intercourse. The Court will not make an order for enforcing such intercourse (*Orme v. Orme* (1824), 2 Add. 382; *Rowe v. Rowe* (1865), 34 L.J. P.M. & A.) 111). But unreasonable refusal of such intercourse justifies the other party in withdrawing from cohabitation (*Davis v. Davis*, [1918] P. 85), and, though it does not constitute desertion (*Jackson v. Jackson*, [1924] P. 19; *Weatherley v. Weatherley*, [1947] 1 All E.R. 563, H.L.), it would be a good answer to a petition by the refusing party for restitution of conjugal rights (*Synge v. Synge*, [1900] P. 180; *affirmed*, [1901] P. 317). A mere offer to live under the same roof is no answer to a suit for restitution of conjugal rights (*Wily v. Wily*, [1918] P. 1; *Lacey v. Lacey* (1931), 17 T.L.R. 577) or to a charge of desertion (*Slawson v. Slawson* 1942, 167 L.T. 260).

- (b) *Clark v. Clark* (1885), 10 P.D. 188.
Russell v. Russell, [1895] P. 315, at p. 333.
Williams v. Williams, [1921] P. at p. 134.

But the existence of a separation deed is not always a bar to a petition for restitution of conjugal rights or a finding of desertion, e.g. where covenants in the deed have been broken (*Kennedy v. Kennedy*, [1907] P. 49; *Looker v. Looker*, (1918) P. 132; *Watson v. Watson*, [1938] P. 258).

- (c) I.e. conduct such as adultery, cruelty, or desertion, which would entitle the injured party to sue for divorce or judicial separation.
 (d) *Russell v. Russell*, [1895] P. 315.
Oldroyd v. Oldroyd, [1896] P. 175.

An agreement for separation entered into, before marriage, is void, as opposed to public policy (*Brodie v. Brodie*, [1917] P. 271).

*Restitution
of conjugal
rights*

1846. If one spouse leave the other, the latter may obtain from the Court a decree for restitution of conjugal rights, unless the respondent prove just cause for leaving.^(a) Such a decree cannot be enforced by attachment; but, where it is obtained by the wife, the Court, at the time of making the decree or at any time afterwards, may order that, in the event of the decree being disobeyed, the husband shall make to her such periodical payments as may be just. The Court may order the periodical payment to be secured for the joint lives of the parties or any shorter period.^(b)

- (a) According to the principles and procedure of the ecclesiastical courts retained by Judicature Act, 1925, ss. 32, 103. Just cause was indicated in *Mogg v. Mogg* (1824), 2 Add. 292 (gross indecency of petitioner); *Beer v. Beer* (1906), 22 T.L.R. 338; *Fisk v. Fisk* (1920), 36 T.L.R. 248 (excessive drink so as to render married life impossible); *Russell v. Russell*, *ubi supra* (gross but false charges). Ruinous extravagance would be just cause (*G. v. G.*, [1930] P. 72); but intemperance *per se* would not be (*Greene v. Greene*, [1916] P. 188); nor wife's inability to agree with stepchildren (*Oldroyd v. Oldroyd*, *ubi supra*). Sentence of imprisonment on a spouse does not necessarily justify the other spouse in continuing to live apart after the former's release (*Williamson v. Williamson* (1882), 7 P.D. 76) unless it constitutes cruelty; *Bosworthick v. Bosworthick* (1901), 86 L.T. 121; *Boyd v. Boyd*, [1938] W.N. 336.

- (b) Judicature Act, 1925, s. 187, re-enacting substance of Matrimonial Causes Act, 1884, s. 2.

Tangye v. Tangye, [1914] P. 201 (overruling *Clutterbuck v. Clutterbuck* (1913), 108 L.T. 573).

As to the effect of disobedience to an order for restitution in constituting statutory desertion, see *post*, § 1867. As to the right of the husband to sue a third person through whose acts he is deprived of the *consortium* of his wife, see *ante*, §§ 926, 929. As to possible rights of the wife in a similar case, see *ante*, §§ 930, 931.

*Husband
may not
coerce wife*

1847. A husband is not entitled to use force, or to keep his wife in confinement, for the purpose of compelling his wife to live with him; ^(a) nor is he entitled to a writ of Habeas Corpus for the purpose of restoring her to his custody.^(b)

- (a) *R. v. Jackson*, [1891] 1 Q.B. 671. (The husband was compelled by a writ of Habeas Corpus to restore his wife to liberty.)
(b) *R. v. Leggatt* (1852), 18 Q.B. 781.

1848. It is the duty of a husband to maintain his wife according to his estate and condition ;^(a) unless they are living apart through her fault.^(b) *Maintenance by husband*

(a) *Jenkins v. Tucker* (1788), 1 Hy. Bl. 90, at p. 94, *per* GOULD, J.

Read v. Legard (1851), 6 Exch. 636.

(b) *Hindley v. Westmeath (Marquis)* (1827), 6 B. & C. 200.

R. v. Flintan (1830), 1 B. & Ad. 227.

Johnston v. Sumner (1858), 3 H. & N. 261.

Culley v. Charman (1881), 7 Q.B.D. 89.

The husband's liability may be enforced (i) by criminal proceedings under the Vagrancy Act, 1824, ss. 3, 4, and the Poor Law Act, 1930, ss. 14, 18, 19, if the wife in consequence of the husband's neglect becomes chargeable to the Poor Law authorities, (ii) by an order of a court of summary jurisdiction for payment to the Poor Law authorities towards her support (Poor Law Act, 1930, s. 19), (iii) by proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925 (see *post*, § 1872), (iv) by means of a suit for restitution of conjugal rights (see *ante*, § 1846) or for judicial separation (see *post*, §§ 1867-1868, 1871). The husband's duty to maintain his wife is also recognized in the rules relating to the wife's power to pledge the husband's credit (*post*, §§ 1854-1855). The husband, if the breadwinner, is entitled to determine the place of residence, and the scale of living. See *G. v. G.*, [1930] P. 72; *Jackson v. Jackson* (1932), 146 L.T. 406; *Mansey v. Mansey*, [1940] P. 139. Cf. *King v. King*, [1942] P. 1. If a man covenant in a deed of separation to provide for his wife during her life and he dies before her the covenant is binding on the estate: *Kirk v. Eustace*, [1937] A.C. 491.

1849. A wife is under no liability to maintain her husband, except that, if she has property, and her husband becomes chargeable to a Poor Law authority, a court of summary jurisdiction may make and enforce such order against her for the maintenance of her husband ^(a) as it may make and enforce, under the Poor Law Act, 1930, s. 19, against a husband for the maintenance of his wife if she becomes chargeable to a Poor Law authority; and if a wife divorce her husband on the ground of his insanity she may be ordered to contribute towards his maintenance.^(b) *Liability of wife*

(a) Poor Law Act, 1930, s. 14.

Law Reform (Married Women and Tortfeasors) Act, 1935, Sched. II.

(b) Matrimonial Causes Act, 1937, s. 10 (2).

The primary liability for the maintenance of the wife's children and grandchildren remains on the husband (Poor Law Act, 1930, s. 14 (2)).

*Funeral
Expenses
of wife*

1850. At common law a husband was liable for expenses reasonably incurred in respect of the funeral of his wife,^(a) even though she was living apart from him at her death,^(b) and he was entitled to be repaid or to retain, out of her property, any such expenses paid by him.^(c) But by the combined effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1 (1)), the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30, ss. 1, 2 (1)), and the Administration of Estates Act, 1925 (15 Geo. 5, c. 23, ss. 32 (1), 33 (1) (2), and 34 (3)) the common law rule is no longer applicable, a wife being in the same position as a man or a feme sole.^(d)

(a) *Jenkins v. Tucker* (1788), 1 Hy. Bl. 90.

(b) *Ambrose v. Kerrison* (1851), 10 C.B. 776.

Bradshaw v. Beard (1862), 12 C.B. (N.S.) 344.

(c) *Gregory v. Lockyer* (1821), 6 Madd. 90.

Willeter v. Dobie (1856), 2 K. & J. 647.

Re McMyn, Lightbourn v. McMyn (1886), 33 Ch. D. 575.

In the two earlier cases, the wife had by her testament charged her separate property with payment of funeral expenses. But *Re McMyn* (in which the husband, being executor, was held entitled to retain funeral expenses, although the estate was insufficient to pay creditors) showed that the husband's right did not depend on there being any charge by will.

(d) *Rees v. Hughes* [1946] K.B. 517, C.A. In this case a married woman died possessed of a considerable estate. Her executors sued her husband for funeral and medical expenses. The Court held that the deceased's estate was liable for these expenses, and left open the question whether a husband remained liable on his deceased wife's leaving no estate.

*Wife's
income re-
ceived by
husband*

1851. When a wife permits her husband to receive the income of her estate for their joint purposes, while the parties are living together and the husband is maintaining the wife, it is presumed that it was intended that such income should become the property of the husband.

Caton v. Rideout (1849), 1 Mac. & G. 599.

Edward v. Cheyne (No. 2) (1888), 13 App. Cas. 385.

Re Dixon, Heynes v. Dixon, [1900] 2 Ch. at p. 580, *per* RIGBY, L.J.

There is no such presumption when accumulations of the wife's income have been used to make a purchase in the husband's name; and the burden of proof in such a case is on the husband to show that a gift to him was intended (*Mercier v. Mercier*, [1903] 2 Ch. 98). Similarly, where the husband receives capital belonging to the wife's estate, the burden of proof is on him to show that it was a gift (*Dixon v. Dixon* (1878), 9 Ch. D. 587; *Re Flamank, Wood v. Lock* (1889), 40 Ch. D. 461). Regarding being had to the purpose of the Law Reform (Married Women and Tortfeasors) Act, 1935, it does not appear that the above-mentioned presumption is affected by that Act.

1852. When husband and wife are living together,^(a) or only temporarily living apart,^(b) and the wife makes savings out of money given to her by the husband for household purposes, or for the maintenance of herself and her children, such savings, and any investments representing them, belong to the husband; unless there is evidence that he intended them to be her property. If either spouse, or any person claiming through either, seeks to establish a gift from one to the other during the marriage, there must be sufficient evidence of a definite intention to make the gift.^(c) *Wife's saving*

(a) *Lady Tyrrel's Case* (1674), Freem (K.B.) 304.

Barrack v. McCulloch (1856), 3 K. & J. at p. 114; *per* WOOD, V.C.

Blackwell v. Blackwell, [1943] 2 All. E.R. 579.

(Cf. *Neal's Case*, cited in *Herbert v. Herbert* (1692), Prec. Ch. 44;

Mangey v. Hungerford (prior to 1734), cited in 2 Eq. Cas. Abr.

App. 156; *Balfour v. Balfour*, [1919] 2 K.B. 571.)

The rule does not apply to the wife's savings from her own property (*Messenger v. Clarke* (1850), 5 Exch. at p. 392, *per* ALDERMAN, B.; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. p. 598).

(b) *Messenger v. Clarke* (1850), 5 Exch. 388.

Birkett v. Birkett (1908), 98 L.T. 540.

In *Slanning v. Style* (1734), 3 P. Wms. 334, the expressions 'the husband,' and in *Brooke v. Brooke* (1858), 25 Beav. 342, the

duration of the separation, and other circumstances, were sufficient to prevent the husband from claiming the savings (see *Birkett v. Birkett*, *ubi supra*).

- (c) *Mews v. Mews* (1852), 15 Beav. 529 (savings of poultry and dairy business carried on by wife on husband's farm).

Re Whittaker (1882), 21 Ch. D. 657.

Income Tax

1853. The separate income or profits of a married woman living with her husband are deemed to be the income of the husband, for the purposes of Income Tax.

Income Tax Act, 1918, All Scheds. Rule 16.

R. v. Creamer, [1919] 1 K.B. 564.

Eadie v. I.R.C., [1924] 2 K.B. 198.

Wife pledging husband's credit

1854. A wife living with her husband may pledge her husband's credit for necessities suitable to his position and the manner in which the household is maintained ;^(a) unless her husband has either (i) supplied her with sufficient necessities, or money to purchase the same, or (ii) expressly forbidden her to pledge his credit.^(b)

- (a) *Phillipson v. Hayter* (1870), L.R. 6 C.P. at p. 41.

Morel Brothers & Co., Ltd. v. Westmorland (Earl), [1904] A.C. 11.

Paquin, Ltd. v. Beauclerk, [1906] A.C. 148.

Gray (Miss), Ltd. v. Cathcart (Earl) (1922), 38 T.L.R. 562.

- (b) *Debenham v. Mellon* (1880), 6 App. Cas. 24.

Folly v. Rees (1864), 5 C.B. (N.S.) 628.

It makes no difference that the wife has a separate income (*Seymour v. Kingscote* (1922), 38 T.L.R. 586); though that fact may be evidence that a tradesman gave credit to the wife, not the husband (*Callot v. Nash* (1923), 39 T.L.R. 292).

Wife living apart

1855. A wife living apart from her husband, either with his consent, or by reason of his misconduct, is entitled to pledge his credit for necessities supplied for the use of herself and their children, living with her ;^(a) unless she is provided by him with an adequate maintenance,^(b) or an income which she has agreed to accept as adequate.^(c) Adultery

by the wife, unless connived at or condoned by the husband, revokes such authority to pledge his credit.^(a)

- (a) *Rawlins v. Vandyke* (1800), 3 Esp. 250.
Bazeley v. Forder (1868), L.R. 3 Q.B. 559.
- (b) *Johnston v. Sumner* (1858), 3 H. & N. 261.
Beale v. Arabin (1877), 36 L.T. 249.
- (c) *Negus v. Forster* (1882), 46 L.T. 675.
Eastland v. Burchell (1878), 3 Q.B.D. 432.
- (d) *Wilson v. Glossop* (1888), 20 Q.B.D. 354.
Harris v. Morris (1801), 4 Esp. 41.

The rules stated in the last two paragraphs appear to be unaffected by the Married Women's Property Act, 1882, and the Law Reform (Married Women and Tortfeasors) Act, 1935, except that the latter Act provides that in every case of judicial separation if alimony has been ordered to be paid by the husband and has not been duly paid he is liable for necessities supplied for the use of his wife (1st Sched. amending s. 194 (1) of the Judicature Act, 1925). Otherwise on judicial separation a wife cannot pledge her husband's credit (*Re Wingfield and Blew*, [1904] 2 Ch. 665, C.A.) "Necessaries" include normally a wife's costs in a matrimonial cause, but her solicitor must be prompt to avail himself of the special procedure of the Divorce Division in that regard. See *Durnford v. Baker*, [1924] 2 K.B. 587 C.A.; *Abrahams (M.), Sons & Co. v. Buckley*, [1924] 1 K.B. 903; *Arnold and Weaver v. Amari*, [1928] 1 K.B. 584; *Wright and Webb v. Annandale*, [1930] 2 K.B. 8, C.A.

1856. A housekeeper or servant presiding over a *Housekeeper* man's household has the same authority, whilst so presiding (but not afterwards), to pledge his credit as a wife.

- Ryan v. Sams* (1848), 12 Q.B. 460.
- Reneaux v. Teakle* (1853), 8 Exch. 682 (approved in *Debenham v. Mellon*, *ubi supra*, at p. 33).

1857. A child, even though living with his parents, *Child* has not, as such, authority to pledge his parents' credit.

- Mortimore v. Wright* (1840), 6 M. & W. 482.
- Shelton v. Springett* (1851), 11 C.B. 452.

TITLE V—NULLITY, DIVORCE, AND JUDICIAL SEPARATION

Nullity

1858. The High Court may pronounce a decree declaring a reputed or voidable marriage to be null and void on any of the grounds specified in Title II *ante*.^(a) Such a decree is, in the first instance, a decree *nisi* only, not to be made absolute till after the expiration of six months from the pronouncing thereof, unless the Court by general or special order from time to time fixes a shorter time ;^(b) and, upon cause being shown in the meantime to the Court by any person (including the King's Proctor), the Court may refuse to make absolute such decree *nisi*, on the ground of collusion, or on the ground that material facts were not brought before the Court.^(c)

(a) Judicature Act, 1925, s. 21.

(b) *Ibid.* s. 183 (1). By a statutory order made in July 1946, the general delay was reduced to six weeks.

(c) *Ibid.* s. 183 (2).

The King's Proctor may intervene at any time before decree absolute (Judicature Act, 1925, s. 181 (2)). See § 1864 *post*.

Grounds for divorce

1859. Subject to § 1860, a petition for divorce may be presented to the High Court either by a husband or a wife, on the ground that the respondent:—

- (i) has, since the celebration of the marriage, committed adultery ;^(a) *or*,
- (ii) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition ;^(b) *or*,
- (iii) has, since the celebration of the marriage, treated the petitioner with cruelty ;^(c) *or*,
- (iv) is incurably of unsound mind and has been

continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition ;^(d) and,

- (v) a petition for divorce may be presented by a wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy, or bestiality.^(e)

(a) Matrimonial Causes Act, 1937, s. 2 (a).

(b) *Ibid.* s. 2 (b).

“Desertion” as a ground for divorce means cessation for at least three years of cohabitation, whether actually effected by the guilty party, or as the result of his misconduct (*Frowd v. Frowd*, [1904] P. 177 at p. 179). Desertion is not always withdrawal from a place ; it is often withdrawal from a state of things (*Pulford v. Pulford*, [1923] P. 18 at p. 21). If a husband persistently commits adultery, his wife is justified in leaving him ; and he will then be deemed guilty of desertion (*Sickert v. Sickert*, [1899] P. 278). But, where a wife has obtained, under the Summary Jurisdiction (Married Women) Act, 1895 (*post*, § 1872), and acted upon, an order absolving her from the duty of cohabiting with her husband, she cannot treat the consequent separation as desertion by her husband for the purposes of this paragraph (*Dodd v. Dodd*, [1906] P. 189 ; *Harriman v. Harriman*, [1909] P. 123). The order must be rescinded and desertion continue therefrom for another three years before a divorce can be obtained (*Gatward v. Gatward*, [1942] P. 97). A separation agreement bars desertion unless repudiated (*Pardy v. Pardy*, [1939] P. 288, C.A.) A deserting spouse may terminate desertion by a genuine offer to return (*Pratt v. Pratt*, [1939] A.C. 417), but it must not be a mere device to defeat the other spouse’s remedy (*Ware v. Ware*, [1942] P. 49). The reports of cases since 1937 show the variety of circumstances which constitute desertion.

(c) *Ibid.* s. 2 (c).

“Cruelty” is conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger (*Russell v. Russell*, [1897] A.C. 395 (see especially *per* Lord DAVEY at p. 468) ; *Evans v. Evans* (1790), 1 Hag. Con. 35). A wife may by conduct short of physical violence be guilty of cruelty : e.g. *Horton v. Horton*, [1940] P. 187.

(d) *Ibid.* s. 2 (d).

There have been a number of reported cases showing the limitations of divorce under this head. Under s. 3 of the Matrimonial

Causes Act, 1937, a person of unsound mind is deemed to be under care and treatment while detained under the Lunacy and Mental Treatment Acts, 1890 to 1930, and certain Service Acts, but while the patient is still under certification permitted absences do not break the continuity of care and treatment (*Safford v. Safford*, [1944] P. 61). No part of a patient's detention in a mental home outside England may be taken into account for the prescribed continuous period of five years. Care and treatment as a voluntary patient only counts if it follows immediately a period under certification; see, however, *Benson v. Benson*, [1941] P. 90.

(e) *Ibid.* s. 2.

This section of the Matrimonial Causes Act, 1937, superseded s. 176 of the Judicature Act, 1925, as originally enacted. Grounds (ii), (iii), and (iv) were entirely new. Until 1857, no English judicial tribunal had power to dissolve a valid marriage. Since the passing of the Act, the process corresponding to the old "*divorce a mens et thoro*" has become known as a "judicial separation"; and the term "divorce" is now restricted to a dissolution of marriage by decree or statute.

*No divorce
for three
years after
marriage*

1860. No petition for divorce may be presented until the lapse of three years from the date of the marriage, except by leave of a Judge of the High Court on the ground of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.

Matrimonial Causes Act, 1937, s. 1.

If, at the hearing of the petition, such leave appears to have been obtained by any misrepresentation or concealment by the applicant, the Court may either (i) on pronouncing a decree *nisi* (§ 1863) impose the condition that no application for a decree absolute shall be made before the lapse of three years from the date of the marriage, or (ii) dismiss the petition. On an originating summons for relaxation of the three years' rule, the judge must have regard to the interests of any children of the marriage, and to the question whether there is any reasonable probability of a reconciliation between the parties before the lapse of three years from the date of the marriage (Matrimonial Causes Act, 1937, s. 1 (1) (2)). The Judge has an unfettered discretion in deciding, in Chambers, whether or not there is "exceptional" hardship or depravity, and the Court of Appeal will not interfere if he has given due consideration to the facts: *Charlesby v. Charlesby* (1947), 203 L.T. Jo. 262.

*Absolute
bars to
divorce*

1861. The Court must dismiss any petition for divorce if it finds that—

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- (i) the petitioner has, during the marriage, been accessory to or connived at the adultery complained of ; *or*,
- (ii) the petitioner has condoned the adultery complained of ; *or*,
- (iii) the petition is presented or prosecuted in collusion with either of the respondents.

Judicature Act, 1925, s. 178 (1), (2).

This section was substituted for the original section 178 by s. 4 of the Matrimonial Causes Act, 1937. The words "with either of the respondents" are intended to cover the case of a husband's petition, in which the alleged adulterer must (except on special grounds) be made a co-respondent, and the case of a wife's petition, in which the alleged adulteress may be ordered to be made a respondent (*ibid.* s. 177 (2) ; *Pepper v. Pepper and Baker* (1926), 96 L.J.(P.) 17 ; *Davis v. Davis and Helbing* (1928), 138 L.T. 623). Condonation means a complete forgiveness and blotting out of an offence known to the condoner to have been committed, followed by a restoration of the *status quo ante* (*Keats v. Keats and Montezuma* (1859), 28 L.J. (P. & M.) 57 ; *Cramp v. Cramp and Freeman*, [1920] P. 158 ; *Crocker v. Crocker*, [1921] P. 25). There is no such thing as contingent condonation (*Henderson v. Henderson and Crellin*, [1944] A.C. 49), but a condoned offence is revived by any subsequent matrimonial misconduct (*Houghton v. Houghton*, [1903] P. 150 ; *Copsey v. Copsey*, [1905] P. 94 ; *Price v. Price and Brown*, [1911] P. 201 ; *Beard v. Beard*, [1946] P. 8 (desertion for less than three years reviving condoned adultery). Condonation obtained by fraud is not an answer to a petition (*Roberts v. Roberts and Temple* (1917), 117 L.T. 157). The changes, apart from strengthening the Court's powers of enquiry, are merely consequential on the creation of the new grounds for divorce.

1862. The Court is not bound to grant a decree of divorce if it finds that the petitioner has been guilty of— *Discretionary bars*

- (i) adultery during the marriage ;^(a) *or*,
- (ii) unreasonable delay in presenting or prosecuting the petition ;^(b)
- (iii) cruelty towards the other party to the marriage ; *or*,

- (iv) having deserted or wilfully separated himself or herself from the other party before the adultery complained of, without reasonable excuse ; *or*,
- (v) such wilful neglect or misconduct as has conduced to the adultery.

Judicature Act, 1925, s. 178 (proviso substituted by s. 4 of the Matrimonial Causes Act, 1937).

- (a) This discretion is unfettered, though judicial, and the *loci classici* among the authorities at present applicable are *Wilson v. Wilson*, [1920] P. 20, and *Apted v. Apted and Bliss*, [1930] P. 246, wherein Lord MERRIVALE, without laying down any exclusive principles, specified the following considerations which should influence the Court : (1) interest of State in maintaining the sanctions of honest matrimony ; (2) refusal of decree if it is likely to encourage immorality ; (3) disclosure of all material facts ; (4) interests of children of the marriage ; (5) guilty party to be placed, if possible, in a position to marry the person with whom adultery has been committed ; (6) fact that parties are not likely to be reconciled ; (7) the interest of petitioner in re-marrying and leading a respectable life. These principles were indorsed in effect by Lord SIMON, C., in *Blunt v. Blunt*, [1943] A.C. 517, which also laid it down that where both parties had committed adultery a decree might in proper cases be granted to each.
- (b) To be fatal to a petition the delay must be culpable, something in the nature of connivance or acquiescence (*Tollemache v. Tollemache* (1859), 30 L.J. (P.M. & A.) 113 ; *Rickard v. Rickard and Bond* (1921), 37 T.L.R. 511), such as would have shown the petitioner to have been insensible to the loss of his wife (*Pellew v. Pellew and Berkeley* (1859), 29 L.J. (P. & M.) 44 ; *Binney v. Binney and Hill*, [1936] P. 178). But various explanations have been accepted, such as poverty (*Edwards v. Edwards and Doncaster* (1900), 17 T.L.R. 38) and misapprehension of the law (*Pointon v. Pointon and Sutton* (1922), 38 T.L.R. 848). Delay by a wife was often considered meritorious by the Ecclesiastical Courts in dealing with petitions for divorce *a mensâ et thoro* ; and the Court in its divorce *a vinculo* jurisdiction has excused long delay by a wife when she hoped for a reconciliation (*Fullerton v. Fullerton* (1922), 39 T.L.R. 46). But the Court of Appeal declined to accept a wife's explanation that she had waited till her son had grown up (*Beauclerk v. Beauclerk*, [1891] P. 189).

*Decree nisi
for divorce*

1863. Every decree for divorce is in the first instance a decree *nisi*, not to be made absolute according to statute till after the expiration of six months from the pronouncing thereof, unless the Court by a

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general or special order from time to time fixes a shorter time. As soon as any decree for divorce is made absolute, either spouse may (subject to § 1835 *ante*) marry again, subject to the right of appeal.

Judicature Act, 1925, s. 183 (1), 184 (1).

A General Order was made in July 1946 on the recommendation of Mr. Justice Denning's Committee on Divorce Procedure fixing the shorter period of six weeks. On special application to the Court, with due notice to the King's Proctor, the time had often been shortened in particular cases for good cause; sometimes to give a child about to be born an opportunity of legitimacy. For this reason also the hearing of divorce suits is sometimes expedited. See § 1858 *ante* as to nullity decrees. The time for appealing from a decree absolute is six weeks (R.S.C. Order 58, s. 15). No appeal lies in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which the order absolute was founded has not done so (Judicature Act, 1925, s. 31 (e)). This applies equally to decrees for nullity of marriage (*ibid.*).

1864. Upon cause being shown to the Court by any person (including the King's Proctor) after the pronouncing of the decree *nisi*, and before it is made absolute, the Court may refuse to make absolute a decree *nisi* for divorce, on the grounds of (a) collusion, or (b) that material facts have not been brought before the Court, or (c) that the decree was obtained contrary to the justice of the case. Refusal of
decree
absolute

Judicature Act, 1925, s. 183 (2) and (3).

Crawford v. Crawford and Dilke (1886), 11 P.D. 150, at p. 157, per Sir J. HANNEN.

In *Pretty v. Pretty*, [1911] P. 83, the decree was made absolute, although the petitioner had falsely denied on oath that she had committed adultery, and the recent tendency is for the Court to make the decree absolute if, on full disclosure at the original hearing, the Court would probably have exercised its discretion, but in most cases where the attempted deception of the Court is persisted in a decree is refused. In addition to the power of showing cause mentioned above, the King's Proctor has a power to intervene during the progress of the cause, or at any time before the decree is made absolute, on any of the above-mentioned grounds (*Sloggett v. Sloggett*, [1928] P. 148). "Any person" may intervene as a member of the public. But this does not include parties to the suit (*Stoate v. Stoate* (1861), 2 Sw. &

Tr. 384; *Harries v. Harries and Gregory* (1901), 86 L.T. 262; *Howarth v. Howarth* (1884), 9 P.D. 218; for they have another remedy. Yet a woman named as an alleged adulteress may intervene as "any person" (*W—M.J. v. W—H.R.W.*, [1936] P. 187).

*Application
by respondent
for decree
absolute*

1865. If the successful petitioner does not, within three months^(a) after he or she has become entitled to do so, apply for a decree *nisi* to be made absolute, the party against whom it has been made may do so. In that event the Court will have power to deal with the case as it thinks fit, even to revoke the decree *nisi*.

Matrimonial Causes Act, 1937, s. 9.

(a) Mr. Justice Denning's Committee in 1947 recommended that in general this period be reduced to three weeks.

Any attempt by a wife petitioner to resist such application in order to obtain excessive maintenance is discouraged by the Court. (See *Hunter v. Hunter*, [1934] P. 92. Cf. *Gower v. Gower*, [1938] P. 106.)

*Clergyman's
privilege*

1866. No clergyman of the Church of England can be compelled to solemnise the marriage of a person whose former marriage has been dissolved on any ground and whose former spouse is still living. Nor will a clergyman be bound, as he had been, to allow such remarriage to be celebrated in his church.

Matrimonial Causes Act, 1937, s. 12, substituted for s. 184 (2) and (3) of the Judicature Act, 1925.

*Decree for
judicial
separation*

1867. A husband or wife is entitled to obtain from the Court a decree of judicial separation—

- (i) on any ground on which a petition for divorce might have been presented; *or*,
- (ii) failure to comply with a decree for restitution of conjugal rights; *or*,
- (iii) on any ground on which a decree for divorce *a mensâ et thoro* might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857.

Matrimonial Causes Act, 1937, s. 5, superseding Judicature Act, 1925, s. 185 (1).

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In substance, the grounds for a decree of judicial separation before and after the commencement of the Act of 1937 are the same, except that the two years' minimum for desertion is increased to three. But the Act of 1937 makes a marked change by applying to proceedings for judicial separation the same duties on the part of the Court, and the same bars, as in proceedings for divorce (Matrimonial Causes Act, 1937, s. 5). A wife who petitions for a decree of judicial separation on the ground of adultery may at any stage before decree pray instead for divorce (*Cartledge v. Cartledge* (1862), 4 Sw. & Tr. 249); and, if she has obtained a decree *nisi* of divorce, she is entitled, unless strong cause is shown to the contrary, to convert it, before decree absolute, into a decree of judicial separation (*Parsons v. Parsons*, [1907] P. 331; *Griffiths v. Griffiths* (1912), 106 L.T. 646; *Rutherford v. Richardson*, [1923] A.C. 1; *Daglish v. Daglish*, [1936] P. 49). But not so as to defeat the King's Proctor (*Drummond v. Drummond* (1861), 30 L.J. (P.M. & A.) 177).

1868. The circumstances in which a petition for divorce may be granted or dismissed (§§ 1861, 1862) *Bars to judicial separation* apply in like manner to a judicial separation.

Matrimonial Causes Act, 1937, s. 5.

Delay in presenting a petition for judicial separation was formerly not a ground for dismissing such petition; *Cooke v. Cooke* (1863) 3 Sw. & Tr. 246; but now as in divorce unreasonable delay is a discretionary bar. In *Blanchard v. Blanchard* (1928), 44 T.L.R. 313, HILL, J., held that the Court was bound to grant a decree of judicial separation based on the ground of adultery, because the suit was brought to secure provision for the wife and for custody, and therefore the suit was not brought wholly for a collateral purpose, as in *Matthews v. Matthews* (1859), 1 Sw. & Tr. 499; *affirmed* (1860), 3 Sw. & Tr. 161 (where petition was dismissed).

1869. A petition (i) for a declaration of pre- *Presumption of death* sumption of death and (ii) for divorce may be presented on the ground that the petitioner has reasonable grounds for supposing that the other party to the marriage is dead.

Matrimonial Causes Act, 1937, s. 8 (1).

Seven years' absence of the respondent spouse and the fact that the petitioner has no reason to believe that such spouse has been living within that time, is under this section, evidence of death until the contrary is proved (Matrimonial Causes Act, 1937, s. 8 (2)). See *Parkinson v. Parkinson*, [1939] P. 346. The petitioner will be

entitled to remarry after decree absolute, in the same way as in other suits for divorce or nullity, but if the vanished spouse reappears before decree absolute the decree *nisi* fails ; *Manser v. Manser*, [1940] P. 224.

*Effects of
judicial
separation*

1870. The effect of a decree of judicial separation is, without dissolving the marriage, to relieve the parties from the duty of cohabitation, and to place the wife, as from the date of the decree, in the position of an unmarried woman, with regard to property, contracts, and wrongs and injuries, except that when, upon a judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he is liable for necessaries supplied for her use.

Judicature Act, 1925, s. 194 (1), as amended by Law Reform (Married Women and Tortfeasors) Act, 1935, 1st Sched.

*Reversal of
judicial
separation
decree*

1871. On the application by petition of a person against whom a decree for judicial separation has been made, the Court, on being satisfied that the allegations contained in such petition are true, may reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

Judicature Act, 1925, s. 185 (3).

This procedure has not been used in modern times, though set up by the Matrimonial Causes Act, 1857, s. 23. In the one reported case (*Phillips v. Phillips* (1866), L.R. 1 P. & D. 169), it was held that the non-appearance of the respondent to the original petition for judicial separation, owing to a state of ignorance, sufficed for a petition for reversal.

*Wife's
separation or
maintenance
order*

1872. A married woman may obtain from a court of summary jurisdiction orders providing (1) that she be no longer bound to cohabit with her husband ; (2) for custody of children ; (3) for a weekly pay-

ment of not more than two pounds for herself and ten shillings for each child by way of maintenance, in the following cases :—

- (i) if her husband has been summarily convicted of an aggravated assault upon her within the meaning of the Offences against the Person Act, 1861, s. 43 ; *or*,
- (ii) if her husband has been convicted on indictment of an assault upon her, and sentenced to pay a fine of more than five pounds, or to a term of imprisonment of more than two months : *or*,
- (iii) if her husband has deserted her ; *or*
- (iv) if her husband has been guilty of persistent cruelty to her, or has been guilty of wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain ; *or*,
- (v) if her husband has been guilty of persistent cruelty to her children ; *or*,
- (vi) if her husband has knowingly communicated a venereal disease to her ; *or*,
- (vii) if her husband has compelled her to submit to prostitution ;^(a) *or*,
- (viii) if her husband is an habitual drunkard or user of dangerous drugs, or incapable of managing his affairs, though not a lunatic so found or certified ;^(b) *or*,
- (ix) if her husband has been guilty of adultery.^(c)

A non-cohabitation or separation order, while in force, has the effect in all respects of a decree of judicial separation on the ground of cruelty (§ 1870).

- (a) Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5.
Married Women (Maintenance) Act, 1920.
Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1.
- (b) Habitual Drunkards Act, 1879, s. 31.
Dangerous Drugs Acts, 1920 and 1923.
Licensing Act, 1902, s. 5, amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 3.
Robson v. Robson (1904), 68 J.P. 416.
- (c) Matrimonial Causes Act, 1937, s. 11 (1).

But a non-cohabitation order should not be made except where cruelty or assaults are proved (*Harriman v. Harriman*, [1909] P. 123). No order can be made in favour of a married woman who has committed adultery, unless condoned to, connived at, or condoned by the husband (Act of 1895, s. 6); and any order will be discharged on proof that the woman has voluntarily resumed cohabitation with her husband, or has committed adultery (*ibid.* s. 7), provided that the husband has not been guilty of connivance or conduct condoning, or has not condoned the wife's adultery (Act of 1925, s. 2). The order may also be varied on the application of either party (*ibid.*) without the necessity of producing fresh evidence (Money Payments (Justices Procedure) Act, 1935, s. 9).

*Husband's
separation
order*

1873. A husband may obtain a separation order on the ground that his wife is an habitual drunkard,^(a) or that she has been guilty of persistent cruelty to his children,^(b) or, that she has been guilty of adultery.^(c)

- (a) Licensing Act, 1902, s. 5 (2).
- (b) Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (3).
- (c) Matrimonial Causes Act, 1937, s. 11 (2).

*Conversion
of decree or
order*

1874. Where a person has been granted a judicial separation on an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, he may present a petition for divorce on substantially the same facts (if they afford a ground for divorce) and the Court may accept such decree or order as proof, subject to the petitioner giving evidence.^(a) For the purposes of such petition a period of desertion immediately preceding the institution of such previous proceedings shall be deemed immediately to precede

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the presentation of the divorce petition, if the previous decree or order has remained effective.^(b)

(a) Matrimonial Causes Act, 1937, s. 6 (1), (2). But see § 1859 *supra*, note, as to effect of a separation order on desertion.

(b) *Ibid.* s. 6 (3).

Green v. Green, [1946] P. 112 is an application of this sub-section.

1875. In any matrimonial cause in the Divorce Court a wife or putative wife, whether petitioner or respondent, may petition for alimony pending suit, which will be allotted according to the principles and practice of the Ecclesiastical Courts, usually on the basis of one-fifth of the joint incomes, less her own income, if any. An additional order may be made for the support of young children pending suit.

Judicature Act, 1925, ss. 21, 32, and 190 (3).

So long as a wife was a competent suitor in the Ecclesiastical Courts in a matrimonial cause, the husband was required to make provision for her according to his means pending the suit (*Welton v. Welton*, [1927] P. 162, 169, 177). If the wife is receiving an allowance under a deed of separation, the Court will not usually order a larger sum to be paid (*Birch v. Birch*, [1908] W.N. 81 (order refused because wife had income from settled fund); *Wood v. Wood* (1887), 57 L.T. 746; *Weber v. Weber and Pyne* (1858), 1 Sw. & Tr. 219; *Powell v. Powell* (1874), L.R. 3 P. & D. 186). The proportion of the husband's income allotted is not rigidly one-fifth; the Court must have regard to all the circumstances, and allow for the incidence of income tax (*Sherwood v. Sherwood*, [1929] P. 120).

1876. On any decree for divorce or nullity of marriage, the Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable; and it may, if it thinks fit (in addition or in the alternative), order that the husband shall pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support, as the Court

may think reasonable.^(a) In case of a decree of divorce, an order may be made in favour of a guilty wife,^(b) usually *dum sola et casta*.^(c)

(a) Judicature Act, 1925, s. 190 (1), (2).

This provision is called "permanent maintenance". The allotment is made usually about one-third of the joint incomes of the parties whose marriage is dissolved, less the wife's income, if any; but in cases of very large incomes the proportion allowed to the wife is often less. The Court must make due allowance for the incidence of income tax (*Sherwood v. Sherwood*, [1928] P. 215; *affirmed*, [1929] P. 120; *Shearn v. Shearn*, [1931] P. 1). What proportion is to be secured for the wife's life depends on what capital or property he possesses at the time when the order for security is made, which is capable of being secured without detriment to his earning faculties, but if the husband die before a security order is made, the wife cannot claim against his estate (*Dipple v. Dipple*, [1942] P. 65). The Matrimonial Causes Act, 1937, s. 10 (2) and (4), provides for maintenance on petitions for divorce on the ground of insanity. The Court may order maintenance for children of the marriage to be secured during their minority (*ibid.* s. 10 (4)).

(b) *Bent v. Bent and Footman* (1861), 2 Sw. & Tr. 392.
Robertson v. Robertson and Favagrossa (1883), 8 P.D. 94.
Edwards v. Edwards and Francis, [1894] P. 33.
Felton v. Felton and Woodward (1921), 37 T.L.R. 761.

(c) *Ashcroft v. Ashcroft and Roberts*, [1902] P. 270.
Squire v. Squire and O'Callaghan, [1905] P. 4.
Ollier v. Ollier, [1914] P. 240.
Fergusson v. Fergusson (1931), 48 T.L.R. 86.

Permanent alimony

1877. When a decree of judicial separation is made on a wife's petition, the Court may order the husband to make such provision for her as may be just, in accordance with the principles exercised by the Ecclesiastical Courts in cases of divorce *a mensâ et thoro*.

Judicature Act, 1925, ss. 21, 23, 190 (3).

This provision is called "permanent alimony". The Court has no power to secure it; and it can only be ordered during joint lives. The assessment is made in the same way as for alimony *pendente lite* (see § 1875 *ante*); and, if the wife has no means, the award is usually about one-third of the husband's income, with some extra provision for young children of the marriage the custody of whom has been granted to her (*Cobb v. Cobb*, [1900] P. 294).

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1878. When a decree for restitution of conjugal rights is made on a wife's petition, the Court may then or at any time afterwards, in the event of the decree not being complied with, order the husband to make to the petitioner such periodical payments as may be just ; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. The Court may order the husband to secure such payments by deed.

Judicature Act, 1925, s. 187.

The principles of assessment of what are known as "periodical payments" are practically the same as for permanent alimony (§ 1877); provision being made for joint lives of the spouses, except that all or part may be secured. Such security is rarely ordered, unless the respondent has independent capital or property capable of being secured without detriment to his earning faculties. Alternatively a wife petitioner may apply for alimony under s. 193 (4) of the Judicature Act, 1925 ; but this course is rarely taken, because under that section the Court has no power to secure payments (*Allison v. Allison*, [1927] P. 308).

1879. The Court has power, on application at any time, to discharge or vary any of the orders mentioned in §§ 1875, 1876, 1877 and 1878, having regard to all the existing circumstances, including any increase or decrease in the means of either party, except an order for security which is final.

Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14.

This Act repealed s. 196 of the Judicature Act, 1925, which applied only to periodical payments in restitution suits and had become superfluous.

1880. When a husband has obtained a decree for divorce or judicial separation by reason of his wife's adultery, cruelty or desertion, the Court may order such settlement as it thinks proper to be made of any property (either in possession or reversion) to which the wife is entitled, for the benefit of the innocent party, and of the children of the marriage, or any or either of them.

Judicature Act, 1925, s. 191 (1).
 Matrimonial Causes Act, 1937, s. 10 (3).
Midwinter v. Midwinter, [1893] P. 93.
Matheson v. Matheson, [1935] P. 171.

*Restitution of
 conjugal
 rights*

1881. The Court can exercise the same power on behalf of a husband who is granted a decree for restitution of conjugal rights, not complied with; and the order may be extended to cover periodical payments by the wife out of her profits of trade or earnings.

Judicature Act, 1925, s. 191 (2).

*Variation of
 settlements*

1882. The Court may, after pronouncing a decree for divorce or for nullity of marriage, enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit; and the Court may exercise such powers notwithstanding that there are no children of the marriage.

Judicature Act, 1925, s. 192.

The question of what is a post-nuptial settlement, and the wide latitude given to the words of the section, were fully discussed in *Prinsep v. Prinsep*, [1929] P. 225, *Prinsep v. Prinsep*, [1930] P. 35, C.A., and *Melville v. Melville and Woodward*, [1930] P. 99, 159, C.A. In variation of settlements the principle on which the Court acts is to place the parties in the same position as far as may be, as if the marriage had not been dissolved through the fault of one of them, having due regard to the interests of the injured party and the children of the marriage. Settlements should not be disturbed more than is necessary to give effect to these considerations (*Prinsep v. Prinsep*, *ubi supra*, per LAWRENCE, L.J., [1930] P. at p. 49). Post-nuptial settlements include a deed of separation (*Clifford v. Clifford* (1884), 9 P.D. 76; and conveyance of a house to spouses as joint tenants (*Smith v. Smith* (1945), 61 T.L.R. 331.)

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1883. A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of his adultery with the petitioner's wife ; and the Court may direct in what manner such damages shall be paid and applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

*Damages
against co-
respondent*

Judicature Act, 1925, s. 189.

The claim for such damages is based on the same principles as the former common law action for criminal conversation ; and it may be combined with a petition for dissolution of the marriage, as is usually the case, or with a petition for judicial separation (see *Mason v. Mason* (1882), 7 P.D. 233, *reversed* (1883) 8 P.D. 21, *N. v. N.*, [1913] P. 75), or may form the subject of a petition by itself (*Cox v. Cox and Warde*, [1906] P. 267 ; *Bell v. Bell and Cooke* (1932), *Times*, June 10th. ; *Hopkins v. Hopkins and Castle* (1933), 50 T.L.R. 99). The principle in assessing damages is to compensate the husband for the loss which he has suffered, and not to punish the co-respondent ; though the jury may take into account the outrage to the husband's feelings and the use of superior means to seduce a wife from her duty (*Butterworth v. Butterworth and Englefield*, [1920] P. 126). The social position of the co-respondent may be taken into account (*Hinton v. Hinton and Spillett* (1930), 46 T.L.R. 585). It is not usual to award costs against a co-respondent who had no reason to believe, when he committed the adultery, that the respondent was a married woman. But there is no hard and fast rule to that effect (*Norris v. Norris and Smith*, [1918] P. 129 ; *Burne v. Burne and Helvoet*, [1920] P. 17). Condonation by a husband of his wife's adultery bars a claim for damages (*Bernstein v. Bernstein*, [1893] P. 292. If a husband has obtained damages in a common law action for enticement of his wife (§ 926 *ante*), he will not be allowed further damages against the defendant, cited as co-respondent in a subsequent divorce suit brought by the husband, unless some grave matter for consideration has not been dealt with in the enticement action (*Menon v. Menon and Worth*, [1936] P. 200).

1884. The death of either party to a petition for dissolution or nullity of marriage puts an end to the suit ;^(a) but a claim for damages may be proceeded with against an alleged adulterer notwithstanding the death of the respondent wife.^(b) If a co-respond-

*Death of
party*

ent die before the hearing, the suit against him abates ; though the petition may proceed against the wife respondent.^(c)

- (a) *Bevan v. McMahon and Bevan (falsely called McMahon)* (1859), 2 Sw. & Tr. 58.
Brocas v Brocas (1861), 2 Sw. & Tr. 383.
Grant v. Grant and Bowles and Pattison (1862), 2 Sw. & Tr. 522.
Stanhope v. Stanhope (1886), 11 P.D. 103.
Thomson v. Thomson and Rodschinka, [1896] P. 263.
Schenck v. Schenck (1908), 24 T.L.R. 739.
 (b) *M. v. M. and A.* (1910), 36 T.L.R. 305.
Monsell v. Monsell and Cain, [1922] P. 34.
Kent v. Atkinson, [1923] P. 142.
 (c) *Sutton v. Sutton and Peacock* (1863), 32 L.J. (P.M. & A.) 156.
Walpole v. Walpole and Chamberlain, [1901] P. 86.
Wigglesworth v. Wigglesworth, Bennett and Smith (1911), 27 T.L.R. 463.

If damages have been awarded against a co-respondent, and he die before they are paid into Court, his estate is not liable for them (*Brydges v. Brydges and Wood*, [1909] P. 187) ; and the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), specifically excludes this class of claim from its operation, although in such circumstances this Act permits a claim for the enforcement of an order for costs against his estate (*Richards v. Richards*, cited in *Dipple v. Dipple*, [1942] P. 65). Similarly under this Act if a petitioner die after decree absolute an order for costs may be enforced by executors (see also *Hawks v. Hawks and Fenwick* (1876), 1 P.D. 137). If a husband respondent die before the hearing, the Court may order the wife's costs paid into Court to be paid out to the wife's solicitors (*Beaumont v. Beaumont*, [1933] P. 39).

Jurisdiction of the Court

1885. The jurisdiction of the Court differs according to the nature of the matrimonial cause and is as follows :—

- (i) Divorce : where the husband is domiciled in England at the institution of the suit.^(a)
- (ii) Judicial separation : if (i) the husband is domiciled in England at the institution of the suit ; or (ii) either spouse is then resident in England.^(b)
- (iii) Restitution of conjugal rights : where both parties are either resident or domiciled in

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England, or had a matrimonial home in England when cohabitation ceased.^(c)

- (iv) Nullity : if the putative marriage was celebrated in England whatever the domicil of the parties, providing that the petitioner is resident in England ;^(d) or the putative husband is domiciled in England,^(e) or, where the ceremony took place abroad, either the respondent is resident in England, though domiciled abroad, or the putative wife was domiciled in England up to the date of the ceremony and is resident in England when she institutes the suit.^(f)

- (a) *Le Mesurier v. Le Mesurier*, (1895) A.C. 517, P.C.
Lord Advocate v. Jaffrey, [1921] A.C. 146.
A.-G. for Alberta v. Cook, [1926] A.C. 444.
Salvesen (or von Lorang) v. Austrian Property Administrator, [1927] A.C. 641 (overruling *Niboyet v. Niboyet* (1878), 4 P.D. 1, on this point).

It is not necessary that a co-respondent should be domiciled or even reside in England, or be a British subject (*Rayment v. Rayment and Stuart* [1910] P. 271) to give the Court jurisdiction.

- (b) *Ward v. Ward* (1923), 39 T.L.R. 440.
Anghinelli v. Anghinelli, [1918] P. 247.
Eustace v. Eustace, [1924] P. 45.
Raeburn v. Raeburn (1928), 138 L.T. 672.
Sim v. Sim, [1944] P. 87.
(c) *De Gasquet James (Countess) v. Mecklenburg-Schwerin (Duke)*, [1914] P. 53.
Perrin v. Perrin, [1914] P. 135.
(d) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.
Sottomayor v. de Barros (1877) 3 P.D. 1.
Linke (otherwise Van Aerde) v. Van Aerde (1894), 10 T.L.R. 426.
Hutter v. Hutter (otherwise Perry), [1944] P. 95.
(e) *Salvesen (or von Lorang) v. Austrian Property Administrator*, *ubi supra*.
(f) *Roberts v. Brennan*, [1902] P. 143.
White (otherwise Bennett) v. White, [1937] P. 111.
But see *per contra De Reneville (Comtesse) (otherwise Sheridan) v. De Reneville* [1947] 2 All E.R. 112.

It was held by BATESON, J., in *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29, on the authority of *obiter dicta* of Lord PHILLIMORE in *Salvesen's Case*, *ubi supra*, that, in a suit for nullity on

the alleged ground of impotence where the respondent husband was domiciled abroad, the English Court had no jurisdiction and the court of the domicile had exclusive jurisdiction ; but this decision has been negatived in *Hutter v. Hutter* (otherwise *Perry*), *ubi supra*. The jurisdiction of the English Court in nullity, as well as in judicial separation and restitution of conjugal rights, is the same as in the Ecclesiastical Courts before 1858. The essential purpose of a suit for a declaration of nullity of marriage is to ascertain whether or not a valid marriage was contracted. If, for informality or impotence or bigamy or consanguinity, the Court finds that there was no such marriage, the decree proclaims that there never was any marriage. The Ecclesiastical Courts used to annul incestuous marriages wherever solemnized and wherever the parties lived. Before considering the question of jurisdiction, the Court must hear the facts ; and, if it appears that there was never any marriage, it may, quite apart from the factors of residence or domicile of the male party, exercise jurisdiction on the basis that the female petitioner has never lost her English domicile through participating in an invalid ceremony. This seems to have been the *ratio decidendi* of BUCKNILL, J., in *White v. White*, *ubi supra*, but JONES, J., took a contrary view in *De Renneville's case* (*supra*).

*Wife's
domicile*

1886. There are two exceptions to the exclusive rule of domicile as founding jurisdiction in divorce : (1) where a husband domiciled in England deserts his wife and acquires thereafter a foreign domicile, the wife may sue in England ;^(a) (2) in cases of marriages during the war which began in 1939 celebrated in England between parties, where the husband was at the time of the marriage domiciled outside the United Kingdom and the wife was at that time domiciled in England.^(b) But apart from these statutory exceptions during coverture a wife keeps and, even after being granted a decree of judicial separation a wife keeps, the domicile of her husband.^(c)

(a) Matrimonial Causes Act, 1937, s. 13.

(b) Matrimonial Causes (War Marriages) Act, 1944.

(c) *Harvey v. Farnie* (1882), 8 App. Cas. 43.

Turner v. Thompson (1888), 13 P.D. 37.

Lord Advocate v. Jaffrey, [1921] 1 A.C. 146.

A.-G. for Alberta v. Cook, [1926] A.C. 444.

H. v. H., [1928] P. 206.

Hard v. Hard [1926] D. 111.

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1887. Indian High Courts have jurisdiction to decree a divorce and make incidental orders in cases where the parties are British subjects domiciled in England or Scotland, and where a Court in India would have jurisdiction if the parties were domiciled in India, subject to the grounds of relief and the principles and procedure allowed by English law, and to the petitioner being resident, and the last matrimonial residence being, in India. But this does not apply unless either the marriage was solemnized in India or the matrimonial offence complained of was committed in India. *Indian divorce jurisdiction*

Indian and Colonial Divorce Jurisdiction Act, 1926, as amended by an explanatory Act of 1940 bearing the same title.

Courts in India have discretion to refuse to hear a petition when satisfied that the suit should be heard in the Court of domicile (*ibid.* s. 1 (1) (d)). The decree may be registered in England and Scotland, as the case may be, on the application of any person having an interest, e.g. a respondent (*Wilkins v. Wilkins* (1932), 101 L.J. (P.) 35), and may be enforced in the country of the domicile (s. 1 (1) (3)). The Act has been applied by Orders in Council to Kenya, Straits Settlements, Jamaica, Ceylon, Hong Kong and Burma.

SECTION II

RELATIONS OF CHILDREN, PARENTS,
AND GUARDIANS.

TITLE I—LEGITIMACY

General rule **1888.** A person is legitimate who is the child of parents between whom the relation of marriage existed, either at the time when he was begotten, or at the time when he was born, or at any intervening time.

Co. Litt. 7 b.

Bl. Comm. I, 434.

Doe d. Birkwhistle v. Vardill (1840) 6 Bing. N.C. 385.

Gardner v. Gardner (1877), 2 App. Cas. 723.

*Legitimation
by subsequent
marriage*

1889. The marriage of the parents of a person born before such marriage renders such person legitimate, if, at the date of the marriage, or on January 1 1927, whichever be the last date, his father was domiciled in England or Wales, and neither of his parents was at the time of his birth validly married to a third person.

Legitimacy Act, 1926, s. 1.

Re Lowe, Stewart v. Lowe, [1929] 2 Ch. 210.

M. v. M., [1946] P. 31. Approved by Lord MERRIMAN, P.,
in Divisional Court case of *C. v. C.* (1947), (*Times*,
May 2 1st).

Where one of the parents was apparently married to a woman not the mother of the child at the time of the latter's birth, and a decree of nullity for impotence was granted him, it was held that his subsequent marriage to the mother of the child legitimated the latter (*Newbould v. A.-G.*, [1931] P. 75). Nor does the restriction about marriage of the parents apply where the child is domiciled in a country where, by the law of the domicile, he would be legitimated by the subsequent marriage (*Collins v. A.-G.* (1931), 145 L.T. 551 ;

Legitimacy Act, 1926, s. 8.). Earlier decisions of the Divorce Court purporting to limit the effect of this Act in regard to orders for custody were not followed in *M. v. M.*, *ubi supra*.

1890. Independently of the Legitimacy Act, 1926, the marriage of the parents of a person born before such marriage renders such person legitimate, if the father was, both at the date of the birth and at the date of the marriage, domiciled in a country in which the marriage has, according to the law of that country, the effect of rendering such person legitimate.^(a) But a person who is legitimate only by reason of the provisions of this paragraph is not entitled to succeed as heir of the body, to any real estate in England;^(b) nor can any ascendant or collateral relation of his succeed as his heir to real estate in England.^(c)

(a) *Munro v. Munro* (1840), 7 Cl. & Fin. 842.

Re Goodman's Trusts (1881), 17 Ch. D. 266.

Re Grove, Vaucher v. Treasury Solicitor (1888), 40 Ch. D. 216.

Presumably, a similar rule would apply if the law of the father's domicile treated such child as legitimate on any other ground (*Re Goodman's Trusts*, *ubi supra*, at p. 297, *per* JAMES, L.J.)

(b) *Doe d. Birtwhistle v. Vardill* (1835), 2 Cl. & Fin. 571; subsequent proceedings *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895.

This rule has lost most of its importance by the passing of the Administration of Estates Act, 1925.

(c) *Re Don's Estate* (1857), 4 Drew. 194.

Re Cullum, Mercer v. Flood, [1924] 1 Ch. 540.

1891. A person legitimated under the Legitimacy Act, 1926, is entitled, as if he had been born legitimate, to take any interest in the estate of an intestate dying after the date of legitimation or under disposition coming into operation after that date, or by descent under an entailed interest created after that date.^(a) On the death intestate of such legitimated person, his successors take the same interests as if he had been legitimate.^(b) On the death since the beginning of 1927, intestate, of the mother of an illegitimate child, she having then no legitimate

*Rule of
father's
domicile*

*Succession
rights of
legitimated
persons*

issue, the illegitimate child or his issue succeeds as if legitimate ; and the mother of an illegitimate child, who dies intestate, succeeds in the same manner to the child's estate.^(c) A legitimated person has the same rights and is subject to the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate.^(d)

(a) Legitimacy Act, 1926, s. 3 (1).

(b) *Ibid.* ss. 4, 5.

(c) *Ibid.* s. 9 (1), (2).

(d) *Ibid.* s. 6.

The Act contains saving clauses as to succession to titles of honour and property devolving therewith and otherwise.

*Presumption
of legitimacy*

1892. The child of any woman is presumed to be the child of any man to whom she was married at any such time as is mentioned in § 1888 *ante*.

Banbury Peerage Case (1811), 1 Sm. & St. 153.

Gardner v. Gardner (1877), 2 App. Cas. 723.

Russell v. Russell, [1924] A.C. 687, *per* Lord FINLAY, at p. 705.

*Proof of
non-access*

1893. In legitimacy suits or affiliation proceedings the presumption stated in § 1892 may be rebutted by proof *aliunde* that, at any time when the child could have been begotten, (i) the father was absent from England,^(a) or (ii) was impotent,^(b) or (iii) the parents had no opportunity of sexual intercourse during the marriage,^(c) or (iv) it is highly improbable that such intercourse took place.^(d) But direct evidence of the husband or wife that such intercourse did not take place during the marriage is not admissible to rebut the presumption.^(e)

(a) Co. Litt. 244.

Presumably it is implied that the mother remained in England.

(b) *Banbury Peerage Case* (1811), 1 Sm. & St. 153.

(c) *Hawes v. Draeger* (1883), 23 Ch. D. 173.

Burnaby v. Baillie (1889), 42 Ch. D. 282.

(d) *Morris v. Davies* (1837), 5 Cl. & Fin. 163.

Bosville v. A.-G. (1887), 12 P.D. 177.

The Poulett Peerage, [1903] A.C. 395.

(e) *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591, per Lord Mansfield, at pp. 592, 594.

R. v. Sourton (Inhabitants) (1836), 5 Ad. & El. 180.

The Aylesford Peerage (1885), 11 App. Cas. at p. 9, per Lord Selborne.

Burnaby v. Baillie (1889), 42 Ch. D. at p. 294.

The last rule does not apply to evidence as to intercourse by the parties before marriage (*The Poulett Peerage*, *ubi supra*); followed in *Jackson v. Jackson* (*otherwise Prudom*), [1939] P. 172.

1894. In a matrimonial cause, other than certain classes of suits for nullity, neither husband nor wife may give evidence tending to show that he or she did not have marital relations, if such evidence would tend to bastardize a child born in wedlock.

Rule in Russell v. Russell

Russell v. Russell, [1924] A.C. 687.

This decision put an end to the established practice in the Divorce Court, whereby proof of the birth of a child to a wife and of non-access by her husband during the marriage established adultery by the wife. The rule does not apply where the child has died before the hearing, nor in cases of nullity for impotence (*Farnham v. Farnham* (*otherwise Daniels*), [1937] P. 49; *Burgess* (*otherwise Leadbetter*) v. *Burgess*, [1937] P. 60), nor nullity under s. 7 (1) (d) of the Matrimonial Causes Act, 1937 (*Jackson v. Jackson* (*otherwise Prudom*), *ubi supra*, or where the presumption of cohabitation is negated by a separation order (*Ettenfield v. Ettenfield*, [1940] P. 96, C.A.

1895. The duration of the period of gestation is a question of fact in each case.

Period of gestation

Bosville v. A.-G. (1887), 12 P.D. 177 (276 days).

Burnaby v. Baillie (1889), 42 Ch. D. 282 (279 days).

Gaskill v. Gaskill, [1921] P. 425 (351 days considered not an impossible period).

Clark v. Clark (No. 1), [1939] P. 228 (174 days held possible).

For legal purposes it is assumed that the average duration is from 270 to 280 days.

1896. Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy or on the validity of a marriage,^(a) being domiciled in England or Northern Ireland, or claim-

Declaration of legitimacy

ing any real or personal estate situate in England, may petition the Court for a decree declaring all or any of the following matters :—

- (i) that the petitioner is the legitimate child of his parents ;
- (ii) that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage ;
- (iii) that the petitioner's marriage is a valid marriage ;
- (iv) that he be deemed a natural-born British subject.^(b)

Any decree made by the Court on such petition is binding on the Crown and on all other persons ; provided that the decree shall not prejudice any person—

- (i) if it is subsequently proved to have been obtained by fraud or collusion ; *or*,
- (ii) unless that person has been cited or made a party to the proceedings, or is the heir-at-law, next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party.

Judicature Act, 1925, s. 188.

- (a) Any person born within the British Dominions is *prima facie* a natural-born British subject ; and so are certain other classes of persons. See British Nationality and Status of Aliens Acts, 1914 to 1943.

- (b) But see *Abraham v. A.-G.* (1933), 102 L.J. (P.) 115.

A copy of every petition must be served upon the Attorney-General, who thereupon becomes a respondent (Judicature Act, 1925, s. 188 (4)).

*Including
legitimation*

1897. A person claiming to be legitimated under the Legitimacy Act, 1926, is entitled to present a

petition according to the procedure described in the last preceding paragraph.

Legitimacy Act, 1926, s. 2. (A petition may be brought in the County Court instead of the High Court.)

In *Greenway v. A.-G.* (1927), 44 T.L.R. 124, it was held that such a petition was subject to the ordinary rule of hearing in open court. The following cases brought under this Act were reported :—*Re A. B.'s Petition* (1927), 96 L.J. (P.) 155 ; *Kellett v. A.-G.* (1930), *Times*, January 29th ; *Newbould v. A.-G.*, [1931] P. 75 ; *S. (otherwise U.) v. A.-G.* (1931), 48 T.L.R. 66. *Collins v. A.-G.* (1931), 145 L.T. 551 ; *Abraham v. A.-G.*, *ubi supra*.

TITLE II—DUTIES OF MAINTENANCE AND EDUCATION

*Maintenance
of children
and grand-
children*

1898. Subject to § 1901, the father, mother, grandfather, and grandmother, of any person are bound to provide, so far as they are able, necessary maintenance for such person.

Poor Law Act, 1930, s. 14 (1).

Now including adoptive parents under the Adoption of Children Act, 1926, s. 5 (1) (*Coventry Corporation v. Surrey C.C.*, [1935] A.C. 199, overruling *Ward v. Dorman, Long & Co., Ltd.*, [1933] 2 K.B. 658, see § 1905 *post*).

*Maintenance
of wife's
children*

1899. Subject to § 1901, the husband of any woman is bound to provide necessary maintenance for her children (whether legitimate or illegitimate) born before his marriage to such woman, until they attain the age of sixteen years, or until the death of the mother, whichever first happens.

Poor Law Act, 1930, s. 14 (3).

A putative father against whom an affiliation order has been obtained remains liable, subject to the Bastardy Acts.

*Maintenance
of parents*

1900. Subject to § 1901, every person is bound to provide necessary maintenance for his father and mother.

Poor Law Act, 1930, s. 14 (1).

The liabilities of maintenance imposed by the above §§ 1898–1900, cannot be directly enforced by civil action ; but a failure to discharge them, which leaves the persons who ought to be provided for chargeable to the Poor Law authorities, may be punished summarily (*Vagrancy Act*, 1824, s. 3). And the Public Assistance authorities have power to seize the property of any father or mother liable under § 1898, in order to defray the cost of relief provided for the children by them (*Poor Relief (Deserted Wives and Children) Act*, 1718, s. 1 ; *Married Women's Property Act*, 1908, s. 1. *Poor Law Act*, 1930, s. 165 (4) (a).

*Limits of
liability*

1901. The provisions set out in §§ 1898–1900

impose no liability on any person to provide maintenance who is not able to do so out of his own property or by means of his labour ; nor do they impose any liability in favour of any person who is able to maintain himself.

Poor Law Act, 1930, s. 14 (1).

The words in the Act referring to the persons liable are : " if possessed of sufficient means ". As to the interpretation of the words in the corresponding section of the Poor Relief Act, 1601, s. 7, which previously governed the matter, viz. " being of sufficient ability ", see *Coulson v. Davidson* (1906), 96 L.T. 20.

1902. If poor relief is given to the children of any woman whose husband is beyond the seas, or in custody of the law, or confined in a licensed house or asylum as a lunatic or idiot,^(a) or who is living separate from her husband,^(b) it is to be given upon the same conditions as if she were a widow.^(c) A married woman having property is subject to the same liability for the maintenance of her children and grandchildren as her husband is subject to for the maintenance of her children or grandchildren (*ante*, § 1898),^(d) and is liable to provide maintenance for her parents, in the same manner as if she were unmarried.

(a) Poor Law Amendment Act, 1844, s. 25.

(b) Divided Parishes and Poor Law Amendment Act, 1876, s. 18.

(c) Poor Law Act, 1930, s. 18 (b).

(d) *Ibid.* s. 14 (4).

Married Women's Property Act, 1882, s. 21.

Law Reform (Married Women and Tortfeasors) Act, 1935, Sched. II.

These provisions do not relieve the husband from any legal liability to maintain his wife's children or grandchildren (Poor Law Act, 1930, s. 14 (4) proviso). Under s. 193 (3) of the Judicature Act, 1925, as superadded by s. 10 (4) of the Matrimonial Causes Act, 1937, a married woman with means, on divorcing her husband on the ground of insanity, may be ordered to secure certain maintenance for the issue of the marriage during minority.

*Maintenance
of illegiti-
mate
children*

1903. The provisions of §§ 1898-1900 do not (except where expressly mentioned) impose any liability to provide maintenance for illegitimate children or grandchildren.^(a) But the mother of an illegitimate child, so long as she is unmarried or a widow, is bound to provide necessary maintenance for such child till he attains the age of sixteen, or, being a female, marries under that age; provided that such mother is not liable to support a female child who, before the Age of Marriage Act, 1929, came into force, married under the age of sixteen.^(b) The father of an illegitimate child may be compelled to make a contribution (not exceeding ten shillings a week) to the mother or other person having custody of the child, for the purpose of maintaining such child until the child attains the age of thirteen.^(c) *Semble*: this liability exists, even though the child was born out of the jurisdiction; unless it is proved that the status of the child is governed by foreign law,^(d) and it is not extinguished, if an order has actually been made, by the subsequent marriage of the mother.^(e)

(a) *Westminster (City) v. Gerrard* (1632), 2 Bulst. 346.

But see *R. v. Reve* (1631), *ibid.* 344.

(b) Poor Law Act, 1930, s. 14 (2).

(c) Bastardy Laws Amendment Act, 1872, ss. 4, 5.

Bastardy Laws Amendment Act, 1873, s. 5.

Affiliation Orders Act, 1914, s. 3.

(d) *R. v. Humphrys*, [1914] 3 K.B. 1237.

(e) *Davies v. Evans* (1882), 9 Q.B.D. 238, 242.

Plymouth Guardians v. Gibbs, [1903] 1 K.B. 177.

The application for compelling such contribution must be made to the Justices of the Peace at Petty Sessions; and the evidence of the mother as to the paternity requires corroboration in some material particular (*Cole v. Manning* (1877), 2 Q.B.D. 611). In some cases the Justices may order the contribution to continue until the child attains the age of sixteen (Bastardy Laws Amendment Act, 1872, s. 5). An affiliation order cannot be enforced against the estate of a deceased putative father (*Re Harrington, Wilder v. Turner*, [1908] 2 Ch. 687). An affiliation order may be made on the application of any single woman, which includes a woman judicially separated from her husband (*Boyce v. Cox*, [1922] 1 K.B. 149).

• **1904.** It is the duty of the parent, guardian,^(a) and every person who has the custody of any child between the ages of five and fifteen^(b) years, to cause him to receive efficient full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise.

*Liability for
education of
children*

(a) Education Act, 1944, s. 114.

(b) *Ibid.* ss. 35, 36.

If, in the case of a child over the age of five years, the duty is neglected habitually or without reasonable excuse, the local education authority must take proceedings to obtain from a court of summary jurisdiction an order for the child to attend some certified efficient school ("attendance order"), which will be enforced by means of a fine or imprisonment (Education Act, 1944, ss. 39, 40).

1905. Orders for the adoption of an unmarried minor resident in England or Wales, or a British subject, may be made by the Court^(a) subject to the provisions of the Adoption of Children Act, 1926, on the application of two spouses jointly,^(b) or one person who shall be either at least twenty-five years of age or not less than twenty-one years older than the minor. But the Court may make an order for adoption if—

*Adoption
orders*

- (i) The applicant is less than twenty-five years of age, if the mother of the infant is the applicant.
- (ii) The applicant is less than twenty-one years older than the infant if the applicant and the infant are within the prohibited degrees of consanguinity, or if the application is made by or on behalf of two spouses jointly of whom the wife is the mother of the infant or the husband is its putative father.^(c)

(a) Adoption of Children Act, 1926, s. 8 (the High Court or County Court or Court of Summary Jurisdiction).

(b) *Ibid.* s. 1 (3). But in certain circumstances the Court may on the application of one spouse dispense with the consent of the other (s. 2 (4)).

- (c) *Ibid.* ss. 1, 2. An order can only be made in exceptional circumstances, where the would-be adopter is a male and the infant a female.

*Consents
required*

1906. An adoption order cannot be made except with the consent of the parent or guardian or the person having the custody of or liable to contribute to the support of the infant.

Adoption of Children Act, 1926, s. 2 (3). (But in certain circumstances the Court may dispense with such consent.)

*Conditions
of order*

1907. The Court must, before making an adoption order, be satisfied (1) that any guardian or parent who consents to the order understands that it will permanently deprive him or her of his or her rights over the minor, (2) that the order is for the welfare of the minor, and (3) that the applicant is not receiving any monetary or other consideration for the adoption save as sanctioned by the Court;^(a) and it may impose such terms and conditions as the Court deems just.^(b)

(a) Adoption of Children Act, 1926, s. 3.

(b) *Ibid.* s. 4.

*Effect of
order*

1908. Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or guardian as to the custody, maintenance, and education of the minor will devolve on the adopter, as though the minor had been born to the adopter in lawful wedlock;^(a) and the minor will in those respects stand towards the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

(a) Adoption of Children Act, 1926, s. 5 (1).

Two spouses, adopting a minor, stand in the same legal position, and the minor to them, as if they were the lawful father and mother of the minor. But, generally speaking, adoption does not affect rights of succession to property, as to which see *post*, § 2046).

An order for custody was made in a nullity suit in the case of a child adopted by the parties, under s. 5 of the Act (*Martin* (*otherwise*

Crawley v. Martin (1930), 46 T.L.R. 257). An adopted child under sixteen takes the adopter's settlement under the Poor Law Act, 1930, s. 93 (4) (*Coventry Corporation v. Surrey C.C.*, [1935] A.C. 199, overruling *Ward v. Dorman, Long & Co., Ltd.*, [1933] 2 K.B. 658, a workman's compensation case).

TITLE III—CUSTODY AND GUARDIANSHIP OF MINORS

*Parents
equal
guardians*

1909. Both parents have an equal right to the guardianship of their minor (infant) children.

Guardianship of Infants Act, 1925, s. 1.

The Guardianship of Infants Act, 1925, seems to sweep away the former common law right of the father to guardianship in preference to the mother, and substitutes the welfare of the infant as the first and paramount consideration in any court proceedings. This Act, which, according to the preamble, was passed to bring the law as to guardianship of infants into consonance with the Sex Disqualification (Removal) Act, 1919, merely declared the existing practice in the Chancery Division (*Re Agar-Ellis*, *Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *Re Thain*, *Thain v. Taylor*, [1926] Ch. 676). See also *Re McGrath (Infants)*, [1893] 1 Ch. 143, 148, *per* LINDLEY, L.J., and *W. v. W.*, [1926] P. 111, 115, *per* Lord MERRIVALE, P.). The section does not apply to illegitimate children or affect the rights of an only parent (*Re Carroll*, [1931] 1 K.B. 317). Since 1926 the tendency has been to choose whichever parent is most likely to bring up the child the better, and to make the father, if the only spouse earning or possessing means, financially liable. The old law, that when a girl under age marries, her father ceases to be her natural guardian (*Mendes v. Mendes* (1848), 1 Ves. Sen. 89), still holds good.

*Surviving
parent as
guardian*

1910. After the death of one parent of a minor, the surviving parent becomes guardian of such child either alone or jointly with any guardian appointed by the deceased parent by deed or will, or with any guardian appointed by the Court in default of a guardian appointed by the deceased parent.^(a)

- (a) Guardianship of Infants Act, 1925, s. 4, superseding and developing Guardianship of Infants Act, 1886, s. 2. (Prior to the earlier Act the mother's right of custody was subject to the power of any guardian appointed by the father (*Talbot v. Shrewsbury (Earl)* (1840), 4 My. & Cr. 672).)

*Illegitimate
child*

1911. The mother of an illegitimate minor is *primâ facie* entitled to the custody of such minor.

R. v. Nash, *Re Carey* (1883), 10 Q.B.D. 454.
Barnardo v. McHugh, [1891] A.C. 388.

Humphrys v. Polak, [1901] 2 K.B. 385.

R. v. New (1904), 20 T.L.R. 583.

Green v. Green, [1929] P. 101, 105.

But if the mother marry the father, their rights to custody are *primâ facie* equal, under the Guardianship of Infants Act, 1925, prior to which the *primâ facie* right was with the father (*Re Gavagan*, [1922] 1 I.R. 148).

1912. Subject to §§ 1905 to 1908 *ante*, no agreement by which a father of a minor,^(a) or the mother of an illegitimate minor,^(b) agrees to give up, or not to resume the guardianship, custody, or control of such minor, is binding ;^(c) except an agreement contained in a separation deed to the effect that the father shall give up such custody or control to the mother. And such last-mentioned agreement will not be enforced by the Court, if the Court is of opinion that it will not be for the minor's benefit to enforce it.^(d)

*Agreements
as to custody
of minors*

(a) *R. v. Smith, Re Boreham* (1853), 22 L.J. (Q.B.) 116.

Andrews v. Salt (1873), 8 Ch. App. 622.

R. v. Barnardo (1889), 23 Q.B.D. 305.

(b) *Humphrys v. Polak*, [1901] 2 K.B. 385.

(c) Nor will such agreement divest a parent of the legal presumption created by the Children Act, 1908, s. 38 (2), to free him from his liability (*Brooks v. Blount*, [1923] 1 K.B. 257).

(d) Custody of Infants Act, 1873, s. 2.

Re Besant (1879), 11 Ch. D. 508.

Hart v. Hart (1881), 18 Ch. D. 670.

Any condition having the object of depriving a parent of the custody of a child is void (*Re Sandbrook*, [1912] 2 Ch. 471). But this rule does not render invalid a provision in a settlement by a third party that maintenance out of the income of the settled fund shall not be allowed to a child whilst he is in the custody or control of his father (*Re Borwick's Settlement*, *Woodman v. Borwick*, *Re Woodman*, [1916] 2 Ch. 304).

1913. The Court may, on the application of either parent of a minor, make such order as it may think fit with regard to the custody of such minor, and the access thereto of either parent, having regard to the welfare of the minor and to the conduct and wishes of either parent.

*Custody and
access*

Guardianship of Infants Act, 1886, s. 5; 1925, s. 3.
Administration of Justice Act, 1928, s. 16.
See §§ 1922, 1927 *post*.

*Testa-
mentary
guardian*

1914. The father or mother of a minor may by deed or will appoint any person to be guardian of the minor after his or her death. Any guardian so appointed will act jointly with the surviving parent, unless either objects, in which event the guardian may apply to the Court. Joint guardians may similarly apply to the Court on any dispute.

Guardianship of Infants Act, 1925, ss. 5, 6.

*Appointment
by Court*

1915. The Court has power to appoint a guardian for any minor, whether such minor is entitled to property or not.

Re Spence (1847), 2 Ph. 247.

Hope v. Hope (1854), 4 De G.M. & G. at p. 344, *per* CRANWORTH, C.

Re McGrath (Infants), [1893] 1 Ch. 143.

The Court does not, however, commonly appoint a guardian in the absence of any property to which the minor is entitled; because in such a case the Court cannot provide a scheme for the infant's maintenance and education (*Re McGrath (Infants)*, *ubi supra*, at p. 147).

*Removal of
custody from
guardian*

1916. The Court has power to take away the custody and control of a minor from any guardian or person (including the father) and to commit such control and custody to some other person, when such a course is for the benefit of the minor,^(a) even though the guardian has not been guilty of misconduct.^(b)

(a) Guardianship of Infants Act, 1886, ss. 5, 6.

Guardianship of Infants Act, 1925, s. 3.

Shelley v. Westbrook (1817), Jac. 266.

Wellesley v. Beauport (Duke) (1827), 2 Russ. 1; *affirmed sub nom.*

Wellesley v. Wellesley (1828), 2 Bli. (N.S.) 124.

Re Fynn (1848), 2 De G. & Sm. 457.

Re Besant (1879), 11 Ch. D. 508.

Re Agar-Ellis, Agar-Ellis v. Lascelles (1883), 24 Ch. D. at p. 338.

R. v. Gyngall, [1893] 2 Q.B. 232.

(b) *Re Mathieson* (1918,) 87 L.J. (Ch.) 445.

1917. The Court may in its discretion, on being satisfied that it is for the welfare of the minor, also remove from the office of guardian a guardian appointed by the Court and appoint another.

Guardianship of Infants Act, 1886, ss. 2, 6.

1918. After a decree, or pending proceedings, for nullity, divorce, judicial separation, or restitution of conjugal rights not obeyed, the Court may make an order for the custody, maintenance and education of the children of the marriage, being minors, or for placing them under the protection of the Chancery Division.

Judicature Act, 1925, s. 193.

A spouse is not, by reason of his or her guilt, necessarily debarred from full or partial control of, or reasonable access to, children of the marriage (*B. v. B.*, [1924] P. 176). But the usual practice is to grant an order for custody to an innocent party.

1919. Where a decree, *nisi* or absolute, for divorce, or a decree for judicial separation, has been pronounced, the Court may declare a parent by reason of whose misconduct such decree was made to be unfit to have the custody of the minor children (if any) of the marriage; and, thereupon, such parent will not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children.

Guardianship of Infants Act, 1886, s. 7.

1920. Where a minor has been convicted of felony, the Chancery Division of the High Court may, upon the application of any person willing to take charge of him and provide for his maintenance and education, assign the custody of him for any period of his minority to such person.

Infant Felons Act, 1840, s. 1.

Such order suspends the rights as to power and control over the minor of any testamentary or natural guardian (*ibid*).

*Special case
if female
minors*

1921. Where, on the trial of any offence under the Criminal Law Amendment Act, 1885, it is proved that the seduction or prostitution of a girl under the age of sixteen years has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, the High Court may divest such person of all authority over her, and appoint any person willing to take charge of the girl to be her guardian until she has attained the age of twenty-one years, or such age below twenty-one as the Court may direct. The High Court may from time to time rescind or vary such order by the appointment of any other person as guardian or otherwise.

Criminal Law Amendment Act, 1885, s. 12.

*Offences
against
children*

1922. If a child or young person^(a) against whom certain offences have been committed specified in the Children and Young Persons Act, 1933, has no parent or guardian, or none fit to exercise or exercising proper care and guardianship, such child or young person is deemed to require care and protection; and any juvenile Court^(b) may order him or her to be sent to an approved school, or commit him to the care of any fit person,^(c) whether a relative or not, who is willing to undertake the care of him, or place him under the supervision, for not more than three years, of a probation officer, or some other person appointed by the Court for the purpose.^(d)

(a) Under the Children and Young Persons Act, 1933, s. 107 (1), a "child" for this purpose is a person under fourteen years of age, and a young "person" is a person over fourteen and under seventeen.

(b) A "juvenile court" is a specially constituted court of summary jurisdiction consisting of Justices outside metropolitan police areas, or of a metropolitan magistrate sitting with two Justices in such areas (Act of 1933, s. 45; Sched. II).

(c) Children and Young Persons Act, 1938, s. 1, expanding s. 64 of the principal Act of 1933.

(d) Children and Young Persons Act, 1933, ss. 61, 62.

1923. If several guardians are appointed by a testament for the same person, and one or more disclaims the guardianship, or dies, the other or others remain guardians. *Disclaimer, etc., of, by one testamentary guardian*

Eyre v. Shaftsbury (Countess) (1725), 2 P. Wms. 103.

The same rule applies to a guardian appointed by deed. (*Ex parte Ilchester (Earl)* (1803), 7 Ves. 348, 367). But a later will appointing a different guardian revokes the appointment by deed (*Shaftsbury (Earl) v. Hannam* (1677), *Cas. temp. Finch*, 323.)

1924. If several guardians are appointed by the Court, the death of one terminates the guardianship of all ;^(a) but the Court will usually reappoint the survivors as a matter of course.^(b) *Guardians appointed by Court*

(a) *Bradshaw v. Bradshaw* (1826), 1 Russ. 528.

(b) *Hall v. Jones* (1827), 2 Sim. 41.

1925. A father or other person having the lawful custody of a minor has the right to restrain to a reasonable extent the acts and conduct of such minor, to determine the method of his education and maintenance,^(a) and to inflict corporal or other punishment to a reasonable extent upon him ;^(b) and he may delegate these rights to a tutor, schoolmaster or similar person,^(c) or to relatives.^(d) *Powers of guardian*

(a) *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317.

The decision in this case showed that the powers of a father were greater in this direction than those of a testamentary guardian, or a guardian appointed by the Court, and would be less readily interfered with by the Court.

(b) *R. v. Hopley* (1860), 2 F. & F. at pp. 206, 207.

(c) *Ex parte McClellan* (1831), 1 Dowl. 81.

R. v. Hopley, ubi supra.

Fitzgerald v. Northcote (1865), 4 F. & F. 656.

Cleary v. Booth, [1893] 1 Q.B. 465.

Mansell v. Griffin, [1908] 1 K.B. 160, *on appeal*, [1908] 1 K.B. 947.

(d) *Re Mathieson* (1918), 87 L.J. (Ch.) 445.

This paragraph must be read with due regard to the equality of rights conferred by the Guardianship of Infants Act, 1925, on both Parents *inter se*.

Remedies
or inter-
ference in
guardianship

1926. Subject to §§ 1913 and 1916 to 1918 *ante*, and §§ 1927 to 1929 *post*, when the custody of an infant is unlawfully withheld from its father^(a) or guardian,^(b) the father or guardian may obtain restoration of his or her custody by means of a writ of Habeas Corpus, or by application to the Chancery Division.^(c)

- (a) *R. v. Greenhill* (1836), 4 Ad. & El. 624.
R. v. Howes, Ex parte Barford (1860), 3 E. & E. 332.
R. v. Barnardo (1889), 23 Q.B.D. 305.
- (b) 12 Car. II (1660), c. 24, s. 8.
R. v. Isley (1836), 5 Ad. & El. 441.
Re Andrews (1873), L.R. 8 Q.B. 153.
- (c) *R. v. Isley, ubi supra*.
Re Spence (1847), 2 Ph. 247.

It is doubtful nowadays whether a father or guardian may use force in order to resume control over a child. Under the common law he could; in *R. v. De Manneville* (1804), 5 East, 221, the Court refused to interfere with the father's control of a child of very tender years; although it was alleged that he had taken it by force and stratagem from the mother. In *Ex parte Hopkins* (1732), 3 P. Wms. 152, the Court declared that the father was entitled to the guardianship of his children, and intimated that "if he can in any way gain them, he is at liberty to do so, provided no breach of the peace be made in such an attempt; but the children must not be taken away by him in returning from, any more than coming to, this Court." In *Gilbert v. Schwewenck* (1845), 14 M. & W. 488, it was held that one testamentary guardian was not justified in forcibly removing the ward from the custody of the other.

Choice by
minor

1927. The Court will not compel a minor of years of discretion^(a) to return to the custody of its father or guardian^(b) against its will; if the minor's welfare does not require that it should be so compelled.

- (a) Under the rule both in equity and at common law this age is fourteen for boys (*R. v. Clarke, Re Race* (1857), 7 E. & B. 186), and sixteen for girls (*R. v. Howes, Ex parte Barford* (1860), 3 E. & E. 332; *Mallinson v. Mallinson* (1866), L.R. 1 P. & D. 93). In the Divorce Court custody may be granted up to age twenty-one; *Thomassett v. Thomassett*, [1894] P. 295, 302; *Stark v. Stark and Hitchins*, [1910] P. 190, but orders for custody are not usually granted in the Divorce Court in respect of children of sixteen and over.
- (b) *Storke v. Storke* (1730), 3 P. Wms. 51, at p. 52.
Ex parte Hopkins (1732), 3 P. Wms. 152.
R. v. Howes, ubi supra, at pp. 336, 337.

unauthorized interference with the control or custody of such minor,^(b) or unauthorized removal of such minor out of the jurisdiction of the Court,^(c) or marriage of such minor without the consent of the Court,^(d) is a contempt of Court punishable with imprisonment.^(e)

(a) *De Pereda v. De Mancha* (1881), 19 Ch. D. 451.

Semble : the rule does not apply to an alien minor domiciled abroad (*Brown v. Collins* (1883) 25 Ch. D. 56).

(b) *Wellesley v. Beaufort (Duke)*, *Long Wellesley's Case* (1831), 2 Russ. & M. 639.

(c) *Harrison v. Goodall* (1852), Kay, 310.

(d) *Herbert's Case* (1731), 3 P. Wms. 116.

Re Martindale, [1894] 3 Ch. 193.

Re H.'s Settlement, H. v. H., [1909] 2 Ch. 260.

(e) See Guardianship of Infants Act, 1925, s. 9 (6).

It is a common practice, for the purpose of making a minor a ward of Court, to settle a small sum of money upon trust for the minor, and to take proceedings immediately for the administration of the trusts of the settlement (see *Re H.'s Settlement, H. v. H.*, *ubi supra*).

TITLE IV—POWERS OF PARENTS AND GUARDIANS IN RELATION TO THE PROPERTY OF MINORS

real estate
minor

1934. The testamentary guardian ^(a) of a minor is entitled to the possession and control of freehold ^(b) interests in land legally vested in possession in the minor, and to the receipt of the rents and profits thereof, ^(c) and may bring actions in their own names for the protection and recovery of such lands. ^(d)

(a) 12 Car. II (1660), c. 24, s. 9.

Re Helyar, Helyar v. Beckett, [1902] 1 Ch. 391.

(b) *R. v. Wilby (Inhabitants)* (1814), 2 M. & S. 504.

(c) *Palmer v. Danby* (1700), 1 Eq. Cas. Abr. 219.

(d) *Eyre v. Shaftsbury (Countess)* (1725), 2 P. Wms., at p. 122.

R. v. Oakley (Inhabitants) (1809), 10 East, 491.

In view of (1) the powers conferred on the trustees of settlements from which infant's proprietary rights are largely derived; (2) the statutory powers of the tenant for life under the Settled Land Acts; and (3) the abolition of the Law of Inheritance, except in the case of entailed interests, the rights of a guardian in respect of his ward's real estate are now very limited. The powers of trustees and "tenants for life" are set out in Book III, §§ 1440 *et seq.*, *ante*.

rents

1935. A father or mother is not, as such, entitled to any control over, or to any legal interest in, the lands of his child being a minor.

R. v. Sherrington (Inhabitants) (1832), 3 B. & Ad. 714.

legacies to
wards

1936. A father, or (subject to § 1937) a guardian, is not entitled to receive, and cannot give a valid receipt for, a legacy bequeathed to a minor; ^(a) unless the Court authorizes, ^(b) or the testator has authorized, ^(c) such father or guardian to receive it.

(a) *Dagley v. Tolferry* (1715), 1 P. Wms. 285.

Rotherham v. Fanshaw (1748), 3 Atk. 628, at p. 629, *per* Lord HARDWICKE, C.

(b) *Hill v. Chapman* (1789), 2 Bro. C.C. 612.

Walsh v. Walsh (1852), 1 Drew. 64.

(c) *Cooper v. Thornton* (1790), 3 Bro. C.C. 96, 186.

Nor can a minor give a valid receipt for a legacy (*Ledward v. Hassells* (1856), 2 K. & J. 370), except where specifically directed (*Re Deneker, Peters v. Banchereau*, [1895] W.N. 28 ; *Re Schnapper*, [1928] 7 Ch. 420). See the Law of Property Act, 1925, s. 21 ; the Administration of Estates Act, 1925, s. 47 (i), (ii) ; and the Trustee Act, 1925, s. 31 (2) (i).

1937. A testamentary guardian of a minor is entitled to the custody, tuition, and management of the goods, chattels, and personal estate of the minor,^(a) and can (*semble*) give a valid receipt for a legacy bequeathed to the minor.^(b) *Testamentary guardians*

(a) 12 Car. II (1660), c. 24, s. 9.

Guardianship of Infants Act, 1886, s. 4.

(b) *McCreight v. McCreight* (1849), 13 I. Eq. R. 314.

Re Long, Lovegrove v. Long, [1901] W.N. 166.

1938. A guardian appointed by the deed of the father or mother of a minor has the same powers with regard to the minor's property as a testamentary guardian. *Guardian appointed by deed*

12 Car. II (1660), c. 24, ss. 8, 9.

Guardianship of Infants Act, 1886, s. 4.

1939. The old principle laid down by Blackstone^(a) that a father may "have the benefit of his children's labours, while they live with him and are maintained by him" is not compatible with modern usage, save as a basis for an action for seduction.^(b) *Services of child*

(a) Comm. I, 453.

(b) *Terry v. Hutchinson* (1868), L.R. 3 Q.B. 599.

1940. A guardian is, in relation to any property of his ward which comes to his hands, in the position of a trustee for the ward.^(a) He cannot alienate his office.^(b) *Fiduciary position of guardian*

(a) *Beaufort (Duke) v. Bertie* (1721), 1 P. Wms. 703.

Mathew v. Brise (1851), 14 Beav. 341.

(b) *Bedell v. Constable* (1668), Vaugh. at p. 181.

BOOK V

S U C C E S S I O N

SECTION I

TESTAMENTARY SUCCESSION

TITLE I—THE MAKING OF TESTAMENTS AND CODICILS

1941. Subject to §§ 1948–1952 *post*, no testa- *Form of will*
ment or codicil is valid unless—

- (i) it is in writing ; *and*
- (ii) it is signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; *and*
- (iii) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who afterwards attest and subscribe the testament or codicil in the presence of the testator.^(a)

If these provisions are complied with, a document, intended to operate as a testament, may be valid as such, notwithstanding that it does not in terms purport to be a testament.^(b)

- (a) Wills Act, 1837, s. 9.
Cooper v. Bockett (1843), 3 Curt. at pp. 659–60 ; affirmed (1846), 4 Moo. P.C.C. 419.
In the Goods of Wilson (1866), L.R. 1 P. & D. 269.
Griffiths v. Griffiths (1871), L.R. 2 P. & D. 300.
- (b) *In the Goods of Morgan* (1866), L.R. 1 P. & D. 214.
Ferguson-Davie v. Ferguson-Davie (1890), 15 P.D. 109.
In the Goods of Slinn (1890), *ibid.* 156.

A will or testament, in English law, is a disposition (i) intended to take effect on the death of the maker, (ii) on the latter's property

whatever it shall then be, (iii) not intended to have any previous legal effect, (iv) revocable by the maker at any time. These qualifications are compendiously described as "ambulatory". Although the unambiguous word "testament" would perhaps be preferable, English lawyers and laymen alike habitually use the ambiguous word "will", even in formal documents; though in these the additional word "testament" often occurs. Acts of Parliament regularly use the word "will", without any explanatory addition. See further as to the meaning of "will" and "codicil" the notes to §§ 1946, 1947, *post*. A signature written by the testator for some reason other than to give effect to the will is insufficient (*In the Estate of Bean*, [1944] P. 83). As to what is the "foot or end" of a will, see Wills Act Amendment Act, 1852; *In the Estate of Roberts*, [1934] P. 102; and *In the Estate of Long*, [1936] P. 166. Under the Act of 1852, even a signature in the middle of the will has been held to be at the end thereof, where it was "apparent on the face of the will that the testator intended to give effect" to the will thereby (*In the Goods of Hornby*, [1946] P. 171). The witnesses need not subscribe their names in the presence of each other (*Brown v. Skirrow*, [1902] P. at p. 5); and no special form of attestation is necessary, though a form stating that the formalities prescribed by the Wills Act, 1837, s. 9, have been complied with, has advantages in practice. A mere mark or the signing of one's initials is (*In the Goods of Blewitt* (1880), 5 P.D. at p. 117), but (semble) a seal is not (*Smith v. Evans* (1751), 1 Wils. 313), a sufficient signature, either for the testator or the witnesses. See, further, the note to § 1942, *post*.

"Presence"
of witnesses

1942. The witnesses must have seen, or have been in such a position that they were able to see, the testator sign; or, if the testator has acknowledged his signature to them, they must have seen, or have been in such a position that they were able to see, the acknowledged signature.

Daintree v. Butcher and Fasulo (1888), 13 P.D. 102.
Brown v. Skirrow, [1902] P. 3.

Daintree v. Butcher and Fasulo, *supra*, shows that the testator may so acknowledge his signature to the witnesses by implication—e.g. by asking them to sign as witnesses. *Wright v. Sanderson* (1884), 9 P.D. 149, where the witnesses did not remember whether the testator's signature was on the paper when they signed it, shows that the presumption *omnia rite esse acta* may assist the court to decide, in the absence of evidence to the contrary, that the foregoing rules were duly observed—e.g. if the witnesses have since died or if their recollection is imperfect.

1943. It is immaterial that the witnesses did not know that the document, of which they were attesting the signature, was a testament.

Witnesses need not know nature of document

Keigwin v. Keigwin (1843), 3 Curt. 607.

Wright v. Sanderson (1884), 9 P.D. 149.

Daintree v. Butcher and Fasulo (1888), 13 P.D. 102.

1944. When a testament or codicil treats documents already in existence, but not executed as required by § 1941 *ante*, as part of the testament or codicil, these documents will by such reference be incorporated into the testament or codicil ; if it is proved that they are the documents referred to.^(a) When a testament is confirmed or republished by a codicil, this rule is applied to documents coming into existence between the date of the execution of the testament and the date of the execution of the codicil ; if they are treated by the codicil as existing documents, or if the testament, construed as being executed at the date of the execution of the codicil, treats them as existing documents.^(b)

Incorporated documents

(a) *Allen v. Maddock* (1858), 11 Moo. P.C.C. 427.

In the Goods of Smart, [1902] P. at pp. 240, 241.

University College of North Wales v. Taylor, [1908] P. 140.

In pursuance of section 179 of the Law of Property Act, 1925, the Lord Chancellor has issued certain forms (The Statutory Will Forms, 1925) which may thus be incorporated in a will or codicil.

(b) *In the Goods of Truro (Lady)* (1866), L.R. 1 P. & D. 201.

Durham v. Northen, [1895] P. 66.

In the Goods of Smart, [1902] P. 238.

1945. One person cannot give to another the power to make a testament for him ; but he can make the validity of his testament dependent upon a contingency, and such contingency may be the approval of another person.

No one can make another's will

Parsons v. Lanoe (1748), 1 Ves. Sen. 189.

In the Goods of Smith (1869), L.R. 1 P. & D. 717.

Whether words importing a contingency are to be construed

merely as a reason for making the disposition (in which case they will not affect its operation), or as a true condition affecting its operation, is a question of construction for the Court, which looks at the language employed, and, if that is ambiguous, the circumstances, and even the oral declarations of the testator (*In the Goods of Spratt*, [1897] P. 28; *In the Estate of Vines*, *Vines v. Vines*, [1910] P. 147).

codicils

1946. When a testator leaves both a testament and a codicil, the codicil is read as part of the testament;^(a) but if the testament is not forthcoming, and its provisions cannot be proved at the testator's death, and the codicil is forthcoming, the codicil operates alone.^(b)

(a) *Fuller v. Hooper* (1751), 2 Ves. Sen. at p. 242, *per* Lord HARDWICKE.

(b) *In the Goods of Clements*, [1892] P. 254.

It is the custom to describe as a "codicil" any supplementary testamentary instrument which assumes the existence of a prior will. Codicils are frequently used, for instance, when a testator desires to add something to his original will or to cancel (revoke) some part of it. The rules of law for wills and codicils are substantially identical. When reading a will and codicil together, it is said that one should lean towards the construction that the codicil disturbs the will as little as possible (*Doe d. Hearle v. Hicks* (1832), 1 Cl. & Fin. 20; *Re Pitcon*, *Porter v. Jones*, [1944] Ch. at p. 306).

*Confirmation
of wills and
codicils*

1947. If a testator confirms his "will" or "testament", any codicils thereto not previously revoked are (subject to the terms of the confirmation) likewise confirmed.

In the Goods of De La Saussaye (1873), L.R. 3 P. & D. 42.

Green v. Tribe (1878), 9 Ch. D. at p. 234, *per* FRY, J.

This rule may be displaced by the context; it derives from an ancient usage whereby a man's "will" signified the aggregate of his testamentary documents, and so included any existing codicils: *Lemage v. Goodban* (1865), L.R. 1 P. & D. at p. 62; cf. § 1968, *post*. A will or codicil can only be confirmed by a document executed in compliance with the provisions of § 1941 *ante*. See further as to such confirmations, §§ 1967–1970, *post*, and notes thereto.

*Form govern-
ing form of
wills*

1948. The formal validity of a testament of immovables situated in England is, subject to §§ 1950–1951 and 1952 *post*, governed by the provisions set out

in § 1941.^(a) The formal validity of a testament of movables is, subject to §§ 1949-1951 *post*, governed by the law of the testator's domicile at the time of his death.^(b) But no testament or codicil is invalidated, nor is its construction altered, by the testator's subsequent change of domicile.^(c)

(a) *Pepin v. Bruyère*, [1902] 1 Ch. 24.

(b) *Re Price, Tomlin v. Latter*, [1900] 1 Ch. at p. 451, *per* STIRLING, J.

(c) Wills Act, 1861, s. 3.

In *In the Estate of Groos*, [1904] P. 269, GORELL BARNES, J., held that this section of the Act applied to the wills of aliens as well as of British subjects; but this is doubtful (see Cheshire, *Private International Law* (2nd ed.), pp. 520-523; also J.H.C. MORRIS, 62 *Law Quarterly Review*, at p. 175).

1949. A power to appoint movables by testament, conferred by an English settlement, can only be exercised by a testament executed either according to the forms required by the law of the testator's domicile at the time of his death (in addition to the forms, if any, prescribed by the settlement ^(a)) or according to the requirements of § 1941 *ante*.^(b) And if the power is exercised by an instrument executed according to the requirements of § 1941, there may be a valid exercise of the power, though the instrument is invalid as a testament because it does not satisfy the forms required by the law of the testator's domicile.^(c)

*Form of
testamentary
appointment*

(a) *Barretto v. Young*, [1900] 2 Ch. 339.

Re Walker, MacColl v. Bruce, [1908] 1 Ch. 560.

(b) *D'Huart v. Harkness* (1865), 34 Beav. 324.

Re Price, Tomlin v. Latter, [1900] 1 Ch. 442.

Wills Act, 1837, s. 10.

(c) *In the Goods of Hallyburton* (1866), L.R. 1 P. & D. 90.

In the Goods of Huber, [1896] P. 209.

Re Walker, MacColl v. Bruce, ubi supra.

These rules derive from a presumption that, when an English settlement gives a power to appoint by "will", any instrument recognized as a will by the law of England is intended to suffice (*Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. at p. 626). See further the notes to §§ 1950, 1952, *post*. Book III, Section XIV, which also deals with powers of appointment affecting land, must be read subject to this paragraph.

*Wills of
British sub-
jects made
abroad*

1950. A testament or codicil of personal estate (including leaseholds)^(a) made out of the United Kingdom by a British subject (whatever be his domicile at the time of making the testament or at his death) is well executed for the purpose of admission to probate in England if executed in any one of the following forms :—

- (i) the form required by the law of the place where it was made ; *or*
- (ii) the form required by the law of the place where the testator was domiciled when it was made ; *or*
- (iii) the form required by the law of that part of His Majesty's Dominions where the testator had his domicile of origin.^(b)

(a) *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584.

(b) Wills Act, 1861, s. 1.

A will made abroad, and admissible to probate under the provisions of the above paragraph, is a good exercise of a testamentary power of appointment under an English settlement, though it does not comply with the requirements of § 1941 (*Re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502 ; *Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620). See also § 1951 n, *post*.

*Wills of
British sub-
jects made
in the
United
Kingdom*

1951. A testament or codicil of personal estate made within the United Kingdom by a British subject (whatever be his domicile at the time of making the testament or at his death) is well executed, and will be admitted to probate, if executed according to the forms required by the law for the time being in force in that part of the United Kingdom where it was made.

Wills Act, 1861, s. 2.

These sections of the statute, embodied in §§ 1950–1951, apply only to the testaments of British subjects. Therefore a will of movables made by an alien, domiciled in the foreign State of which he is a subject, which is executed in that State in such a manner as to satisfy the requirements of English law, but not in such a manner as to

satisfy the requirements of the foreign State, is invalid (*In the Goods of Von Buseck* (1881), 6 P.D. 211); even though the alien's domicile of origin was British (*Bloxam v. Favre* (1883), 8 P.D. 101; *affd.* on appeal (1884), 9 P.D. 130).

1952. A soldier being in actual military service, *Military and marine wills* and a mariner or seaman being at sea, may make a testamentary disposition of his real and personal estate, either orally, or by a writing which does not comply with the requirements of § 1941 *ante*.

Wills Act, 1837, s. 11.

Wills (Soldiers and Sailors) Act, 1918, s. 3.

Drummond v. Parish (1843), 3 Curt. 522.

A soldier is "in actual military service" not only when he is serving on a campaign, but also when, in obedience to orders, the steps preliminary to starting on a campaign, such as going into barracks with a view to being sent on active service, have been taken (*In the Goods of Hiscock*, [1901] P. 78), or when an order to mobilize has been issued (*Gattward v. Knee*, [1902] P. 99), or *a fortiori*, on the receipt of orders to proceed abroad to serve on a campaign (*Re Booth, Booth v. Booth*, [1926] P. 118). In modern conditions of warfare a soldier in camp, though in England and not under orders to proceed overseas, may be held to be "in actual military service" (*In the Estate of Spark*, [1941] P. 115; *cf. In the Estate of Anderson*, [1944] P. 1; and see R.E. Megarry, 57 *Law Quarterly Review*, 481 *et seq.*), and even one who, before the outbreak of war, receives orders to join his unit to defend the realm against the danger of invasion (*In the Estate of Rippon*, [1943] P. 61). A mariner or seaman is "at sea" if, having joined his ship, he is residing on her, even if he is on shore by virtue of temporary leave (*Earl of Euston v. Seymour (Lord)* (1802), cited in 2 Curt. at p. 339; *In the Goods of Ley* (1840), 2 Curt. 375; *In the Goods of M^r Murdo* (1868), L.R. 1 P. & D. 540); or if he is returning by sea from, or (*semble*) proceeding by sea to, his duty on his ship (*In the Goods of Saunders* (1865), L.R. 1 P. & D. 16). Certain "naval assets" (e.g. wages or other money payable by the Admiralty) of seamen and marines in His Majesty's naval or marine forces cannot ordinarily be bequeathed by an informal will (see Navy and Marine (Wills) Acts, 1865, 1897, 1930, 1939). A female nurse who has received orders to join a hospital ship under military control is a soldier in actual military service for the purposes of this paragraph (*In the Estate of Stanley*, [1916] P. 192). Section 5 of the Act of 1918 extends the expression "soldier" to include a member of the Royal Air Force. The power to dispose includes a power to revoke a former will, even though the former will was in regular form (*In the*

Estate of Gossage, Wood v. Gossage, [1921] P. 194). It extends, moreover, to the exercise of a testamentary power of appointment (*Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82; *Re Earl of Chichester's Will Trusts, Pelham v. Chichester (Countess)*, [1946] Ch. 289).

TITLE II—THE REVOCATION, ALTERATION, AND REPUBLICATION OF TESTAMENTS AND CODICILS

1953. Subject to §§ 1950, 1951 *ante*, the validity of a revocation of a testament or codicil of immovables situated in England is governed by the provisions of this Title.^(a) The validity of the revocation of a testament or codicil of movables is governed by the law of the testator's domicile at the time of his death.^(b) But no testament or codicil is revoked or invalidated, nor is its construction altered, by the testator's subsequent change of domicile.^(c) *Law governing revocation*

- (a) There seems to be no direct authority for this proposition but its truth can hardly be questioned.
- (b) *Bremer v. Freeman* (1857), 10 Moo. P.C.C. at p. 359.
Re Price, Tomlin v. Latter, [1900] 1 Ch. at p. 451.
- (c) Wills Act, 1861, s. 3.
In the Goods of Reid (1866), L.R. 1 P. & D. 74.

Section 3 of the Act of 1861 operates to remedy only a formal invalidity caused by change of domicile; the material validity (i.e. the validity of the dispositions) must be determined by the law of the country in which the testator was domiciled at the time of his death. (See Cheshire, *Private International Law* (2nd ed.), p. 530.)

1954. A testament or a codicil may be revoked or altered at the pleasure of the testator. A testator cannot, by contract or otherwise, deprive himself of this power. *Every will revocable*

Vynior's Case (1610), 8 Co. Rep. at fo. 82 a.

Even if a person has contracted to make a testament containing special provisions, he may, nevertheless, revoke such testament; leaving the persons injured by such revocation to their remedy (if any) for the breach of contract (*Robinson v. Ommanney* (1883), 23 Ch. D. 285; *Re Marsland, Lloyds Bank, Ltd. v. Marsland*, [1939] Ch. 820.

1955. If two or more persons make a joint testament or codicil, or separate testaments or codicils in *Joint wills*

identical terms, any of such persons may at any time revoke or alter his part of the joint testament or codicil, or his separate testament or codicil.^(a) But if one of the parties dies, and the other or others take a benefit under his testament, the estates of such other or others will be liable, if he or they should alter their testaments, to carry out the original arrangement,^(b) provided that the court is satisfied that the parties had intended it to be binding.^(c) If one of the parties to a joint testament or codicil dies, probate will be granted of so much of the instrument as becomes operative at his death.^(d)

(a) *Hobson v. Blackburn* (1822), 1 Add. 274.

In the Estate of Heys, [1914] P. 192.

(b) *Dufour v. Pereira* (1769), 1 Dick. 419.

Walpole (Lord) v. Orford (Lord) (1797), 3 Ves. 402.

Stone v. Hoskins, [1905] P. 194.

Re Hagger, [1930] 2 Ch. 190.

(c) *Re Oldham, Hadwen v. Myles*, [1925] Ch. 75.

Gray v. Perpetual Trustee Co., [1928] A.C. 391.

(d) *In the Goods of Piazzzi-Smyth*, [1898] P. 7.

Revocation by marriage

1956. No testament or codicil is revoked by any presumption of an intention on the ground of, or alteration in circumstances.^(a) But a testament or codicil is revoked by the testator's subsequent marriage, except in two cases, viz. (i) where it is made in exercise of a power of appointment under which the property thereby appointed would not, in default of such appointment, pass to the persons entitled to the testator's property in the event of his intestacy,^(b) (ii) where it is expressed to be made in contemplation of a specified marriage, and that marriage takes place.^(c)

(a) Wills Act, 1837, s. 19.

(b) *Ibid.* s. 18.

In the Goods of Russell (1890), 15 P.D. 111.

In the Estate of Wardrop, [1917] P. 54 (military will).

Re Paul, Public Trustee v. Pearce, [1921] 2 Ch. 1.

(c) Law of Property Act, 1925, s. 177 (1).

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But more is required than a mere reference to marriage generally. Thus the sub-section was held, in *Sallis v. Jones*, [1936] P. 43, not to protect a will which concluded "this will is made in contemplation of marriage".

1957. A testament or codicil may be revoked by *Formal*
writing duly executed as a testament and declaring *revocation*
an intention to revoke it,^(a) or revoked or altered by
a later testament or codicil,^(b) in so far as an intention
to revoke or alter it appears, either expressly or by
implication, in such later testament or codicil.^(c) If
the intention of the testator is to alter but not to
revoke his earlier testaments or codicils by later
instruments, both the earlier and the later instruments
will be admitted to probate, as together containing the
testament of the deceased.^(d)

- (a) Wills Act, 1837, s. 20.
In the Goods of Gosling (1886), 11 P.D. 79.
- (b) Wills Act, 1837, s. 20.
- (c) *Lemage v. Goodban* (1865), L.R. 1 P. & D. 57.
Cadell v. Wilcocks, [1898] P. 21.
Kent v. Kent, [1902] P. 108.
In the Estate of Bryan, [1907] P. 125.
Ward v. Van der Loeff, [1924] A.C. 653.
Re Robinson, Lamb v. Robinson, [1930] 2 Ch. 332.
- (d) *Lemage v. Goodban*, *ubi supra*.
In the Goods of De La Saussaye (1873), L.R. 3 P. & D. 42.

A duly executed testament, which is inoperative owing to the fact that it depends upon a contingency which has not happened, is inoperative to revoke an earlier testament (*In the Goods of Hugo* (1877), 2 P.D. 73). Two inconsistent testaments, each bearing the same date, are, in the absence of proof as to the order of execution, both void for uncertainty so far as they are inconsistent (*Phipps v. Anglesey (Earl)* (1751), 7 Bro. Parl. Cas. at p. 452).

1958. A testament or codicil will be revoked if *Revocation*
the testator, or some other person in his presence *by destruction*
and by his direction, burns, tears, or otherwise de-
stroys the testamentary document, with the intention
of revoking it.^(a) An act of destruction done by
another person without the authority of the testator
cannot be subsequently ratified by him.^(b)

- (a) Wills Act, 1837, s. 20.
- (b) *Mills v. Milward* (1889), 15 P.D. 20.
Gill v. Gill, [1909] P. at p. 161.

Neither the destruction without the intention (*Gill v. Gill*, *ub supra*) nor the intention without the destruction (*Cheese v. Lovejoy* (1877), 2 P.D. 251, *In the Estate of Southerden*, *Adams v. Southerden* [1925] P. 177) will be sufficient; and the extent of the destruction to be effective, must be such as to render the document either incomplete in form (*In the Goods of Morton* (1887), 12 P.D. 141) or unintelligible in substance (*Leonard v. Leonard*, [1902] P. 243) as a testament. A testament may be partially revoked by the destruction of a part of the testamentary document, if such appears to have been the intention of the testator (*In the Goods of Woodward* (1871), L.R. 2 P. & D. 206; *In the Estate of Nunn*, [1936] 1 All E.R. 555; 154 L.T. 498).

*Mechanical
alterations*

1959. A testament or codicil may be revoked or altered by obliterations, interlineations, or other changes in the testamentary document made after execution, with intent to revoke or alter; but only in so far as the words of the document before such change are so effaced that they are not apparent without physical interference with the document.^(a) But such interlineations or other changes in the words of the testament cannot themselves be admitted to probate, as forming part of the testament, unless they are executed in compliance with the requirements of § 1941 *ante*.^(b)

- (a) Wills Act, 1837, s. 21.
Brooke v. Kent (1840), 3 Moo. P.C.C. 334.
Townley v. Watson (1844), 3 Curt. 761.
In the Goods of Horsford (1874), L.R. 3 P. & D. 211.
Ffinch v. Combe, [1894] P. 191.

- (b) Wills Act, 1837, s. 21.

Expert assistance (short of physical interference) may be employed to decipher the original words (*Ffinch v. Combe*, *ubi supra*); and, if the effacement was intended only to operate contingently upon the validity of a substituted clause (see § 1961, *post*), even physical interference to decipher the original words is permitted, e.g. the removal of adhesive paper whereby the testator obliterated a part of his will (*In the Goods of Horsford*, *ubi supra*; *Ffinch v. Combe*, *ubi supra*, at p. 197).

1960. A testament which expressly revokes a former testament revokes appointments made by such testament.^(a) Whether such appointments are revoked by a testament which does not expressly revoke former testaments, depends upon the words used by the testator in the later testament.^(b) But general words of bequest in a later testament will not, without more, revoke an appointment made by an earlier testament in exercise of a special power of appointment.^(c)

(a) *Sotheran v. Dening* (1881), 20 Ch. D. 99.

Re Kingdom (1886), 32 Ch. D. 604.

Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge, [1935] P. 151.

(b) *Kent v. Kent*, [1902] P. 108.

(c) *Cadell v. Wilcocks*, [1898] P. 21.

Probably an appointment under a general power is revoked in such circumstances (Wills Act, 1837, s. 27; *Sotheran v. Dening*, *ubi supra* at p. 106, *per* JESSEL, M.R.). For powers of appointment generally, see *ante*, Book III, Section XIV.

1961. An act or document, purporting to revoke or alter a testament or codicil, is not effectual, unless the intention to revoke or alter accompanies the execution of the act or document, and is unconditional.^(a) If the intention to revoke or alter depends upon the existence or non-existence of facts which the testator erroneously supposes to exist or not to exist,^(b) or upon a mistaken view of the validity of an intended substituted disposition,^(c) the apparent revocation or alteration has no effect ("dependent relative revocation").

(a) *Powell v. Powell* (1866), L.R. 1 P. & D. at p. 212, *per* WILDE, J.

Dancer v. Crabb (1873), L.R. 3, P. & D. 98.

(b) *Campbell v. French* (1797), 3 Ves. 321. (But see *Thomas v. Howell* (1874), L.R. 18 Eq. 198.)

(c) *Onions v. Tyrer* (1716), 1 P. Wms. 343.

Perrott v. Perrott (1811), 14 East at pp. 439, 440.

Dancer v. Crabb, *ubi supra*.

Stamford v. White, [1901] P. 46.

The so-called doctrine of dependent relative revocation (where testator mistakenly believes that if he revokes the will some other

testamentary gift will operate in its stead) is merely an illustration of the general rule that no revocation occurs (other than a revocation by marriage) if *animus revocandi* is absent or is conditional upon some erroneous assumption (*In the Estate of Southerden*, *Adams v. Southerden*, [1925] P. at p. 185; *In the Goods of Hope Brown*, [1942] P. 136).

*Dealings
with property*

1962. No conveyance made or other act done, subsequently to the execution of a testament or codicil, relating to any real or personal estate therein comprised, other than an act which has the effect of revoking, in manner described in §§ 1956–1959 *ante*, any disposition contained in such testament or codicil, will prevent the operation of the testament or codicil with respect to such interest in such real or personal estate as the testator could dispose of by testament or codicil at the time of his death.

Wills Act, 1837, s. 23.

Ford v. De Pontes (1861), 30 Beav. at pp. 593, 594.

Saxton v. Saxton (1879), 13 Ch. D. 359.

This provision of the Wills Act assists section 24 (see § 1983 *post*). After he has made a will of his property testator's interest therein may alter (or he may dispose of it and re-acquire it) before he dies; but the gift may yet stand (§§ 1983, 1986–1987, *post*).

*Codicils may
be revoked
with will*

1963. There is probably no presumption that the revocation of a testament operates as a revocation of any codicils thereto.^(a) But if it appears from the circumstances of the case, that the act of revocation and intention to revoke extended also to all or any of the codicils, such codicil or codicils will be revoked with the testament.^(b)

(a) *In the Goods of Savage* (1870), L.R. 2 P. & D. 78.

Gardiner v. Courthope (1886), 12 P.D. 14.

Cf. *Farrer v. St. Catherine's College* (1873), L.R. 16 Eq. at p. 23, *per* Lord SELBORNE, C.

(b) *Sugden v. St. Leonards (Lord)* (1876), 1 P.D. at p. 206.

In the Goods of Bleckley (1883), 8 P.D. 169.

Lost will

1964. If there is evidence that a person who made a testament or codicil had it in his possession,

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and the testament or codicil is not forthcoming at his death, there is a presumption of law that the testator destroyed it with the intention of revoking it.^(a) Evidence may be given to rebut this presumption, and to prove the contents of the lost instrument;^(b) but if the evidence offered to prove its contents is parol evidence only, it must be of extreme cogency.^(c)

(a) *Eckersley v. Platt* (1866), L.R. 1 P. & D. 281.

This presumption does not apply if the testator becomes insane after the execution of the testament (*Sprigge v. Sprigge* (1868), L.R. 1 P. & D. 608).

(b) *Sugden v. St. Leonards (Lord)* (1876), 1 P.D. 154.

Re Spain (1915), 31 T.L.R. 435.

(c) *Woodward v. Goulstone* (1886), 11 App. Cas. at p. 475, *per Lord*
HERSCHELL, C.

Post-testamentary declarations of the testator are not admissible to prove that a lost testament was duly executed (*Atkinson v. Morris*, [1897] P. 40). It seems that such declarations are admissible to prove the contents of the testament (*Sugden v. St. Leonards (Lord)* (1876), 1 P.D. at p. 241; *Woodward v. Goulstone*, *ubi supra*, at pp. 478-81; *Barkwell v. Barkwell*, [1928] P., at pp. 96, 97.)

1965. In order to establish the revocation of a *Lost revoca-*
testament or codicil by a missing testament or codicil *tion*
subsequently executed, either documentary or other
sufficient evidence of the contents of such subsequent
testament or codicil must be given.

Cutto v. Gilbert (1854), 9 Moo. P.C.C. 131 (see esp. pp. 140-1).

Brown v. Brown (1858), 8 E. & B. 876.

Barkwell v. Barkwell, [1928] P. 91.

1966. If a testament or codicil is produced, with *Alterations*
alterations on the face of it, the person seeking to *in will*
take advantage of the alterations must prove that
such alterations were made before the testament
was executed.^(a) In the absence of evidence, it will
be presumed that the alterations were made after
execution.^(b)

(a) *Williams v. Ashton* (1860), 1 John. & H. 115.

(b) *Cooper v. Bockett* (1846), 4 Moo. P.C.C. 419.

In the Goods of Sykes (1873), L.R. 3 P. & D. 26.

Thus, where the alteration is a mere interlineation without which the passage would be unintelligible, the Court may presume, from the internal evidence of the document, that the interlineation was made before execution (*In the Goods of Cadge* (1868), L.R. 1 P. & D. 543).

Revival of will

1967. A testament or codicil which has been revoked may, unless the document containing it has been wholly destroyed with intent to revoke,^(a) be revived by re-execution with the formalities required by § 1941 *ante*, or by a duly executed codicil which shows an intention to revive the revoked testament or codicil.^(b) Such intention may be shown either by express words, or by dispositions or language inconsistent with any other intention.^(c)

(a) *Rogers and Andrews v. Goodenough and Rogers* (1862), 2 Sw. & Tr. 342.

In the Goods of Steele (1868), L.R. 1 P. & D. 575.

In the Goods of Reade, [1902] P. 75.

(b) Wills Act, 1837, s. 22.

Re Smith (1890), 45 Ch. D. 632.

(c) *In the Goods of Steele*, *ubi supra*, at p. 578.

In the Goods of Reynolds (1873), L.R. 3 P. & D. 35.

In the Goods of Dennis, [1891] P. 326.

A reference by a testator in a later duly executed testament or codicil to a revoked testament by its date will, *prima facie*, revive that testament, if it assumes that such testament is still operative. But this inference may be rebutted, if it can be proved from the circumstances that the testator has made a mistake in the date, and did not intend to refer to that testament (*In the Goods of Ince* (1877), 2 P.D. 111; *Goldie v. Adam*, [1938] P. 85). But if a codicil to a revoked testament is made, and the codicil is drafted with reference to the provisions of such testament, the revoked testament will be revived; for, even though the testator did not in fact intend to revive it, his codicil showed an intention to do so (*In the Goods of Stedham* (1881), 6 P.D. 205; *In the Goods of Dyke* (1881), 6 P.D. 205; *Goldie v. Adam*, [1938] P. at p. 91); and a codicil so drafted without a clause confirming the will may imply an intention to revive only a part of it (*In the Estate of Mardon*, [1944] P. 109).

Codicils revived with will

1968. A codicil whereby a testator expressly revives his "testament" or "will" is perhaps presumed to revive also all the codicils thereto.^(a) But

this presumption may be rebutted by the express words,^(b) or by the nature of the contents, of the reviving codicil.^(c)

(a) *Green v. Tribe* (1878), 9 Ch. D. at p. 234.

(b) *Ibid.*

(c) *In the Goods of Reynolds* (1873), L.R. 3 P. & D. 35.

This so-called presumption probably operated only when the word "will" has been used (in its old sense) to signify the aggregate of the testator's testamentary documents (see § 1947 *ante*), so as to show a sufficient "intention to revive" the codicils as prescribed by the Wills Act, 1837, s. 22. If a will has been modified by codicils, and a later codicil purports to revive or confirm the "will", a like question arises as to whether this shows an "intention to revoke" the earlier codicils, within section 20 of the Act (*Green v. Tribe*, *supra*; § 1947 *ante*).

1969. When any testament or codicil which has been partly revoked and afterwards wholly revoked, is revived, the revival does not extend to the part originally revoked, unless an intention of the testator to the contrary can be shown. *Partial revocation*

Wills Act, 1837, s. 22.

Neate v. Pickard (1843), 2 Notes of Cases, 406.

1970. Subject to § 1983 *post*, a testament revived or confirmed by a later testament or codicil speaks as from the date of the later document. *Effect of revival or confirmation*

Wills Act, 1837, s. 34.

Re Champion, [1893] 1 Ch. 101.

Re Rayer, *Rayer v. Rayer*, [1903] 1 Ch. 685.

Goonewardene v. Goonewardene, [1931] A.C. 647.

Re Picton, *Porter v. Jones*, [1944] P. 303 (implied confirmation).

1971. Ordinarily the Court has no power to alter the contents of a testament.^(a) But if the will of a testator, who dies after the 12th July 1939, domiciled in England, does not make reasonable provision for the maintenance of a "dependant" (wife or husband or dependent child) of the testator, the Court has a limited power to order that such provision be made out of the testator's estate.^(b) *Order of Court for maintenance of "dependant"*

Thereupon, the will has effect as if it had been executed with such variations as are specified in the order.^(c)

- (a) *Scalé v. Rawlins*, [1892] A.C. 342.
- (b) Inheritance (Family Provision) Act, 1938, ss. 1, 5, 6.
Re Pugh, Pugh v. Pugh, [1943] Ch. at p. 395.
- (c) Inheritance (Family Provision) Act, 1938, s. 3.

A child of the testator (including a child adopted by him under the Adoption of Children Act, 1926) is a "dependant", within the Act if incapable of maintaining himself or herself by reason of some mental or physical disability; so also is an infant son or a daughter who has not been married (s. 1 (1)). Orders for maintenance of a "dependant" are ordinarily to be for periodical payments out of the *income* of the testator's net estate (capital may be used only from small estates), so that the "dependants" do not together obtain more than two-thirds (in certain circumstances one-half) of the annual income of the net estate; moreover, the maintenance so ordered is to cease (i) in the case of testator's spouse on re-marriage (ii) in the case of his children on their ceasing to be "dependants" as defined above, and (iii) in any case at the dependant's death (s. 1 (2), (3), (4)). Applications for maintenance must usually be made within six months from the grant of probate to the testator's personal representatives (s. 2). Subject to the foregoing, the Court has a complete discretion to grant or refuse an application for maintenance; but it must have regard to the circumstances of the estate and of the "dependant" and to the reasons, if ascertainable, which led the testator to withhold from the "dependant" a reasonable maintenance by the will; and it has a wide power to hear evidence thereof, including any statement in writing signed by the testator and dated (s. 1 (5), (6), (7)).

TITLE III—CAPACITY TO MAKE OR ATTEST A TESTAMENT OR CODICIL

1972. Capacity to make or attest a testament of immovables situated in England is governed by the provisions of this Title.^(a) Capacity to make or attest a testament of movables is governed by the law of the testator's domicile at the time of his death.^(b) Under English law, subject to the exceptions contained in this Title, every person has full capacity to make and attest a testament.^(c)

*Law govern-
ing testa-
mentary
capacity*

*General
capacity*

- (a) *Re Hernando* (1884), 27 Ch. D. 284.
- (b) *In the Goods of Maraver* (1828), 1 Hag. Ecc. 498.
Re Levoal's Settlement Trusts, [1918] 2 Ch. 391.
- (c) Wills Act, 1837, ss. 3, 14-17.

1973. Subject to § 1972, no person under the age of twenty-one years can make a valid testament,^(a) except that a soldier being in actual military service, and a mariner or seaman being at sea, may make a testamentary disposition of real and personal estate at the age of fourteen,^(b) and exercise a testamentary power of appointment.^(c)

*Wills of
minors*

- (a) Wills Act, 1837, s. 7.
- (b) *Ibid.* s. 11.
Wills (Soldiers and Sailors) Act, 1918, ss. 1, 3.
In the Goods of Farquhar (1846), 4 Notes of Cases, 651.
In the Goods of McMurdo (1868), L.R. 1 P. & D. 540.
- (c) *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82.

A convict can (probably) make a valid testament (*Re Harris, Ex parte Graves* (1881), 19 Ch. D. 1). As regards married women, the Law Reform (Married Women and Tortfeasors) Act, 1935, has taken the final step necessary for their complete emancipation by providing (s. 2) that all property which prior to the Act was separate property of a married woman in equity, or belonged at the time of her marriage to a woman married after the Act, or is acquired by or devolves upon a married woman after the Act, shall belong to such woman in all respects as if she were a femme sole, and may be disposed of by her accordingly. The only married woman excepted from this

provision are those whose marriages took place prior to 1883 ; and, even in their case (s. 4), property acquired by them after 1882 or held for their separate use in equity falls under the provisions of s. 2.

*Soundness
of mind
essential*

1974. No person can make a testament unless he is of sound mind, memory, and understanding when he makes it.^(a) Subject to § 1975 *post*, a testator will be presumed to have had these qualifications in the absence of evidence to the contrary.^(b)

- (a) *Mountain v. Bennet* (1787), 1 Cox, Eq. Cas., at p. 356, *per* EYRE, C.B.
Boughton v. Knight (1873), L.R. 3 P. & D. 64.

If a testator was of sound mind when he gave the instructions for the preparation of his will, and the will was drawn in pursuance of those instructions, the fact that he does not recollect its provisions when he executes it is immaterial ; if he remembers that he gave the instructions, and accepts the document as carrying them out (*Parker v. Felgate* (1883), 8 P.D. 171 ; approved by the J.C. in *Perera v. Perera*, [1901] A.C. at p. 361).

- (b) *Sutton v. Sadler* (1857), 3 C.B. (N.S.) 87.
Cleare v. Cleare (1869), L.R. 1 P. & D. 655.

*Presumption
of unsound-
ness*

1975. If it be proved that a testator was not of sound mind, memory, and understanding at any time prior to the making of the testament, his testament will be presumed to be invalid, until it is proved that he was of sound mind when he made it. The appearance and contents of the testament, and the circumstances attendant upon its execution, will be considered in coming to a conclusion on this point.

- A.-G. v. Parnther* (1792), 3 Bro. C.C. 441.
Cartwright v. Cartwright (1793), 1 Phillim. 90.
Symes v. Green (1859), 1 Sw. & Tr. 401.
Cleare v. Cleare (1869), L.R. 1 P. & D. 655.

*Particular
delusions*

1976. If a testator suffers from a particular delusion, but is otherwise sane, his testament is valid if its contents have not been influenced by the particular delusion.

- Dew v. Clark* (1826), 3 Add. 79.
Banks v. Goodfellow (1870), L.R. 5 Q.B. 549.
Smee v. Smee (1879), 5 P.D. 84.

1977. A testament made while the testator was in a state of intoxication inconsistent with due understanding is invalid. *Will of intoxicated person*

Ayrey v. Hill (1824), 2 Add. 206.

1978. Deafness and dumbness,^(a) blindness,^(b) and inability to read,^(c) do not cause testamentary incapacity. But the Court will require proof that a person thus afflicted knew and approved of the contents of his alleged testament.^(d) *Physical defects and illiteracy*

(a) *In the Goods of Owston* (1862), 2 Sw. & Tr. 461.

In the Goods of Geale (1864), 3 Sw. & Tr. 431.

(b) *Re Axford* (1860), 1 Sw. & Tr. 540.

(c) *Barton v. Robins* (1769), 1 Phillim. 455 n. (b).

(d) *Longchamp d. Goodfellow v. Fish* (1807), 2 Bos. & P.(N.R.) 415.

Edwards v. Fincham (1842), 4 Moo. P.C.C. 198.

1979. A testament or codicil made as the result of the exercise of force,^(a) or fraud,^(b) or undue influence,^(c) is invalid, in so far as its dispositions have been caused by these means.^(d) *Force, fraud, and undue influence*

(a) *Mountain v. Bennet* (1787), 1 Cox, Eq. Cas. at p. 355.

(b) *Lord Donegal's Case* (1751), 2 Ves. Sen. at p. 408, *per* Lord HARDWICKE, C.

Allen v. McPherson (1847), 1 H.L.Cas. at p. 208.

(c) *Wingrove v. Wingrove* (1885), 11 P.D. 81.

Baudains v. Richardson, [1906] A.C. at pp. 184, 185, *per* Lord MACNAGHTEN.

(d) *Trimlestown v. D'Alton* (1827), 1 Dow. & Cl. at p. 95, *per* Lord ELDON, C.

Allen v. McPherson, *ubi supra*, at p. 233, *per* Lord CAMPBELL.

1980. Undue influence, for the purpose of § 1979, means influence of such a nature that the volition of the testator with respect to the disposition in question was subjected to the coercion or domination of another person.^(a) There is no presumption of undue influence from the situation of the parties, or from the fact that the party alleged to have exercised undue influence benefited under the testament.^(b) *What is "undue influence"*

- (a) *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462.
Wingrove v. Wingrove, *ubi supra*.
Baudains v. Richardson, *ubi supra*.

This requirement distinguishes "undue influence" as it affects testaments, from a similar defect as it applies to transactions *inter vivos* (*ante*, Book I, § 191).

- (b) *Boyse v. Rossborough* (1857), 6 H.L.Cas. at p. 49, *per* Lord CRANWORTH.
Parfitt v. Lawless, *ubi supra*.
Spiers v. English, [1907] P. at p. 124.

In this respect also the rule is different from that applying to transactions *inter vivos*. But if circumstances arouse the suspicion of the Court, as where the will was prepared by one who benefits thereunder, the persons setting up the instrument must satisfy the Court that this suspicion was unfounded (*Barry v. Butlin* (1838), 2 Moo. P.C.C. 480; *Tyrrell v. Painton*, [1894] P. 151; *Low v. Guthrie*, [1909] A.C. 278; *Harmes v. Hinkson*, [1946] W.N. 118).

*Competency
of witness*

1981. All persons, whether minors or not, are competent to attest the execution of a testament, if they understand the act which they are performing.^(a) But if the execution of a testament is attested by a witness, to whom, or to whose wife or husband, any beneficial interest in property is given by that testament, the gift to him or her, or to his or her wife or husband, or to any persons claiming under them is void;^(b) unless the testament did not require attestation.^(c)

- (a) *Hudson v. Parker* (1844), 1 Rob. Eccl. at pp. 35, 36.
 (b) Wills Act, 1837, s. 15.
Cresswell v. Cresswell (1868), L.R. 6 Eq. 69.
Re Fleetwood, Sidgreaves v. Brewer (1880), 15 Ch. D. 594.
 (c) *Re Limond, Limond v. Cunliffe*, [1915] 2 Ch. 240 (military will).

If there is a testament with codicils, and a witness has attested the execution of only one of those instruments, he or she, or his or her wife or husband, may take a gift under any of such instruments the execution of which he or she has not attested; although it confirms or republishes the instrument which he or she has attested (*Tempest v. Tempest* (1856), 2 K. & J. 642; *Anderson v. Anderson* (1872), L.R. 13 Eq. 381; *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764). A charge or direction for the payment of debts is not a gift to a creditor for the purposes of this paragraph (Wills Act, 1837, s. 16). If a testament is apparently attested by more than two persons,

and a legacy is bequeathed by it to one of them, the latter cannot take the legacy, unless it can be proved that he did not sign as a witness (*Randfield v. Randfield* (1860), 30 L.J. (Ch.) 177 ; *In the Goods of Sharman* (1869), L.R. 1 P. & D. 661). If, after the execution of the testament, an attesting witness marries a legatee or devisee, the legacy or devise is not thereby invalidated (*Thorpe v. Bestwick* (1881), 6 Q.B.D. 311) ; and a supervising incompetency in a witness does not render a previous attestation invalid (Wills Act, 1837, s. 14). A gift to the abbess of a nunnery is not invalidated by the fact that one of the witnesses to the will subsequently becomes abbess ; because the gift was not to her personally, but in trust for the community (*Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v. Barry*, [1936] Ch. 520). The fact that a person is appointed executor by a testament does not render him incompetent to be admitted a witness to prove its execution, or its validity or invalidity (Wills Act, 1837, s. 17).

TITLE IV—DEVISES, LEGACIES, AND DONATIONS MORTIS CAUSA

*Power of
disposition*

1982. Subject to § 1972 *ante*, a person may by his testament devise all the real and bequeath all the personal property to which he is beneficially entitled at the time of his death, and which, on his death, passes or may pass, to his personal representative,^(a) including any interest of which he was tenant-in-tail in possession at the time of his death, and to which he refers specifically in the devise.^(b)

(a) Wills Act, 1837, s. 3.

Administration of Estates Act, 1925, s. 1.

(b) Law of Property Act, 1925, s. 176 (1).

A direct disposition of real estate by testament is known as a “devise”; a similar disposition of personal estate, as a “legacy” or “bequest”. Certain interests in property cease at death, and therefore do not pass to the deceased’s personal representatives nor under his will. These include, besides interests for his own life, his interest in any property which he held jointly with others who outlive him, and any entailed property which he has not devised under the special power conferred by section 176 of the Law of Property Act, 1925 (*ante*, Book III, §§ 1259, 1712). On the death of a sole trustee, the trust property devolves upon his personal representatives until new trustees are appointed—it does not pass under his will (*ante*, Book III §§ 1647, 1738).

*Will speaks
from death*

1983. Every testament is construed with reference to the dispositions of real and personal property contained in it, to speak and take effect as if it had been executed immediately before the death of the testator; unless a contrary intention appears by the testament.^(a) Such a contrary intention will appear if the date of the testament, as contrasted with the date of the testator’s death, is clearly referred to as governing the extent of the disposition^(b) or if the subject-matter of the disposition is specifically described as belonging to the testator at the date of the testament.^(c)

- (a) Wills Act, 1837, s. 24.
Langdale (Lady) v. Briggs (1856), 2 Jur. (N.S.) at p. 996, *per* TURNER, L.J.
Re Slater, Slater v. Slater, [1907] 1 Ch. 665.
- (b) *Cole v. Scott* (1849), 1 Mac. & G. 518.
Re Ord, Dickinson v. Dickinson (1879), 12 Ch. D. at p. 25, *per* BAGGALLAY, L.J.
Re Clifford, Mallam v. McFie, [1912] 1 Ch. 29.
- (c) *Emuss v. Smith* (1848), 2 De G. & Sm. 722.
Re Portal and Lamb (1885), 30 Ch. D. 50.

1984. If either (subject to § 1983 *ante*) the subject-matter of,^(a) or the persons to be benefited by,^(b) a devise or a legacy, is or are not sufficiently described, the devise or legacy is void for uncertainty. But if there is a devise or a legacy to such of a number or class of persons, or in such proportions, as a person named by the testator shall appoint, without a gift over in default of appointment, and the power is in the nature of a trust in favour of the objects of the power, the fact that no appointment is made will not cause the gift to fail for uncertainty; but the property will be divided equally among the objects of the power.^(c)

- (a) *Fubber v. Fubber* (1839), 9 Sim. 503.
Asien v. Asien, [1894] 3 Ch. 260.
- (b) *Lowndes v. Stone* (1799), 4 Ves. 649.
- (c) *Brown v. Higgs* (1801), 8 Ves. at p. 574.
Re Weekes' Settlement, [1897] 1 Ch. 289.

It has been judicially held that a devise may even be implied, if necessary to prevent defeat of the testator's obvious intention, e.g. under a devise to A (the person who would take on the testator's intestacy) "after the death of B", B may take a life estate by implication (*Manning and Andrews Case* (1576), 1 Leon. 256; *Pibus v. Mitford* (1674), 1 Vent. 372); cf. *Re Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603). But it is doubtful whether this rule would be applied in modern times, especially in the case of a specific gift (see Law of Property Act, 1925, s. 175) or if there is a residuary disposition.

1985. A specific legacy is a gift of some piece of personal property which a testator, identifying it by a sufficient description, and manifesting an intention

Insufficient description

Specific and general legacies

that it shall be enjoyed or taken in the state and condition indicated by that description, separates from the general mass of his personal estate. A general legacy is a gift of personal property not particularly described and identified, and not specially separated from the body of the estate.

Bothamley v. Sherson (1875), L.R. 20 Eq. at pp. 308, 309, *per* JESSEL, M.R.

Robertson v. Broadbent (1883), 8 App. Cas. at p. 815, *per* Lord SELBORNE, C.

*Ademption
of specific
legacies*

1986. A specific legacy fails by ademption if, at the testator's death, the property bequeathed has ceased to exist,^(a) or is not the property of the testator,^(b) or has so changed its form that it no longer answers to the description of it in the testament,^(c) or has permanently changed its locality when the locality is an essential part of its description.^(d) A partial destruction adeems the legacy *pro tanto*.^(e)

(a) *Ashburner v. Macguire* (1786), 2 Bro. C.C. 108.

Re Bridle (1879), 4 C.P.D. 336.

(b) *Ashburner v. Macguire*, *ubi supra*.

(c) *Re Lane, Luard v. Lane* (1880), 14 Ch. D. 856.

Re Gray, Dresser v. Gray (1887), 36 Ch. D. 205.

Re Slater, Slater v. Slater, [1907] 1 Ch. 665.

(d) *Chapman v. Hari* (1749), 1 Ves. Sen. 271.

Colleton v. Garth (1833), 6 Sim. 19.

R. Johnston, Cockerell v. Essex (Earl) (1884), 26 Ch. D. at p. 553.

(e) *Ashburner v. Macguire*, *ubi supra*.

The doctrine of ademption applies equally to gifts made under a testamentary power of appointment, whether the power be general or special (*Re Dowsett, Dowsett v. Meakin*, [1901] 1 Ch. 398; *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100). But the doctrine is inapplicable to a general legacy (*Re Borne, Bailey v. Bailey*, [1944] Ch. 190).

*Acts of
strangers*

1987. A change in the character of the property bequeathed, made by a third person without the knowledge, and against the wishes, of the testator, will not cause the legacy to be adeemed.^(a) But the fact that the change has been effected by a public authority will not prevent ademption taking place.^(b)

(a) *Shaftsbury (Earl) v. Shaftsbury (Countess)* (1716), 2 Vern. 747.

Jenkins v. Jones (1866), L.R. 2 Eq. 323.

(b) *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665.

But such a change (e.g. by a company of its shares) is no ademption if it leaves the property substantially the same (*Re Slater, supra*; *Re Clifford, Mallam v. McFie*, [1912] 1 Ch. 29; *Re Leeming, ibid.* 828.

1988. If a testator's assets are not sufficient for the payment of the general legacies bequeathed by his testament, the general legacies will abate, and, in the absence of a contrary direction by the testator,^(a) abate rateably.^(b) But possibly, if a general legacy is given to a creditor to whom a debt is owing exceeding the amount of the legacy, in consideration of the abandonment of the debt, it has priority over the other general legacies.^(c)

(a) *Lewin v. Lewin* (1752), 2 Ves. Sen. 415.

Re Hardy, Wells v. Borwick (1881), 17 Ch. D. 798.

But a direction to pay a legacy to a testator's widow within three months of his death does not amount to a direction to the contrary; and such legacy will abate rateably with the other general legacies, if there is a deficiency of assets (*Re Schweder's Estate, Oppenheimer v. Schweder*, [1891] 3 Ch. 44).

(b) *Barton v. Cooke* (1800), 5 Ves. at p. 464.

See also § 2146, *post*. If a legacy is given free of legacy duty, the duty payable is treated as an additional legacy and added to the legacy for the purpose of reckoning the amount of the abatement (*In re Turnbull*, [1905] 1 Ch. 726).

(c) *Re Whitehead, Whitehead v. Street*, [1913] 2 Ch. at p. 59, *per FARWELL, L.J.*

1989. A general legacy which the testator directs to be paid out of a particular fund indicated by him is called a "demonstrative" legacy.^(a) So long as such particular fund lasts, the legacy is treated as specific; but if the fund has been wholly or partially exhausted during the testator's lifetime, the legacy ranks wholly or to that extent as a general legacy.^(b)

(a) *Page v. Huish* (1863), 1 Hem. & M. at p. 671.

- (b) *Robinson v. Geldard* (1852), 3 Mac. & G., at p. 745.
Sellon v. Watts, Smith v. Watts (1861), 9 W.R. 847.

Accordingly, a diminution in the designated fund does not adeem such a legacy (*Re Webster, Goss v. Webster* (1937), 156 L.T. 128).

*Residuary
devises and
bequests*

1990. A residuary devise or bequest includes all property comprised or intended to be comprised in any other devise or bequest contained in the testament, which has failed to take effect.^(a) None of such property is excluded unless it is specifically excepted by the testament.^(b)

- (a) Wills Act, 1837, s. 25.
Cambridge v. Rous (1802), 8 Ves. at p. 25, *per* GRANT, M.R.
Blight v. Hartnoll (1883), 23 Ch. D. 218.
Re Mason, Ogden v. Mason, [1901] 1 Ch. at p. 632, *per* VAUGHAN WILLIAMS, L.J.
 (b) *Re Bagoi, Paton v. Ormerod*, [1893] 3 Ch. 348.
Re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726.

Lapsed or revoked shares of residue do not fall into residue (*Green v. Pertwee* (1846), 5 Hare, 249; *Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162); unless the testator shows an intention to that effect (*Re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369; *Re Parker*, [1901] 1 Ch. 408), or unless the residue is bequeathed to persons jointly and one of them survives the testator (*Webster v. Webster* (1726), 2 P. Wms. 347).

*Title of
beneficiary*

1991. Until the personal representative has assented to a devise or legacy, the devisee or legatee (even if the devise or legacy is vested) has only a right to administration of the estate and transfer or payment of the subject-matter of the devise or legacy in due course.^(a) When the personal representative has assented, a devisee or specific legatee has a legal or equitable right (vested or contingent as the case may be) to the subject-matter of the devise or legacy, as from the death of the testator, and can enforce such right against the personal representative and third parties.^(b) But no action at law to recover a general legacy lies against the personal representative, even after assent.^(c)

- (a) *Bl. Comm.* II, 512.
- (b) *Saunders's Case* (1599), 5 Co. Rep. at fo. 123 b.
Re West, West v. Roberts, [1909] 2 Ch. at p. 185, *per* SWINFEN
EADY, J.
- (c) *Deekes v. Strutt* (1794), 5 Term Rep. 690.
Jones v. Tanner (1827), 7 B. & C. 542.
Re West, ubi supra at p. 186.

Detailed provisions as to assents by the personal representative are laid down by the Administration of Estates Act, 1925, ss. 36 and 38. An assent may be in any form and may even occur by implication (*Attenborough v. Solomon*, [1913] A.C. at p. 83; *Wise v. Whitburn*, [1924] 1 Ch. 460; *Inland Revenue Commissioners v. Smith*, [1930] 1 K.B. 713). But it is incapable of passing a legal estate in land (including leaseholds) unless it is in writing, signed by the personal representatives (s. 36 (4)), though even here an informal or implied assent may pass an equitable interest to the devisee (*Re Hodge, Hodge v. Griffiths*, [1940] Ch. at p. 264). A personal representative cannot ordinarily be required to distribute any part of the estate before the expiration of a year from the death (Administration of Estates Act, 1925, s. 44; *Re Tankard, Tankard v. Midland Bank Executor and Trustee Co., Ltd.*, [1942] Ch. 69).

1992. The assent of the personal representative may be made subject to a condition subsequent, if the condition is within the powers of the representative to impose as the administrator of the assets.^(a) When once an unconditional assent has been voluntarily given, it cannot be retracted;^(b) but a payment made by a personal representative to a legatee without notice of an existing debt due from the estate, may be recovered by the representative from the legatee, to the extent of the debt.^(c)

*Conditional
assent of
representa-
tive*

- (a) *Elliott v. Elliott* (1841), 9 M. & W. at p. 28, *per* PARKE, B.
Administration of Estates Act, 1925, s. 36 (10).
- (b) *Noel v. Robinson* (1686), 1 Vern. 90.
Newman v. Barton (1690), 2 Vern. 205.
- (c) Administration of Estates Act, 1925, ss. 36 (9), 38 (1).
Fervis v. Wolferstan (1874), L.R. 18 Eq. 18.

This case and *Whittaker v. Kershaw* (1890), 45 Ch. D. 320, show that the executor can also recover if he pays with notice of a contingent liability which has not yet become a debt. For the right of a creditor to follow the testator's assets into the hands of legatees and others, see § 2145, *post*.

*Representative
may permit
devisee to
take possession of
land*

1993. The personal representative may, if he thinks fit, without assenting to the devise, permit a devisee to take possession of the land devised. But such possession does not prejudice the right of the representative to take or resume possession, nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant, or occupier in possession or actual occupation of the land.

Administration of Estates Act, 1925, s. 43 (1).

*Interest on
legacy for
life*

1994. If a general legacy is bequeathed for life, with remainder over, interest does not begin to accrue in favour of the life tenant, till the end of a year from the testator's death.

Gibson v. Bott (1802), 7 Ves. at p. 96.

The reason assigned by Lord ELDON is, that it is only the interest of the legacy which is given to the tenant for life; and, as the legacy is not payable till a year from the death (see note to § 1991, *ante*), no interest can accrue until that date. But where residuary personalty is so bequeathed, interest or income will usually begin to accrue for the life tenant as from the testator's death (see *Allhusen v. Whittell* (1867), L.R. 4Eq. 295; *Brown v. Gellatly* (1867), 2 Ch. App. 751, *ante* § 1757).

*Income of
devise or
specific
legacy*

1995. A vested devisee or specific legatee is entitled to all the profits accruing from the property devised or bequeathed, as from the testator's death,^(a) and is (*semble*) chargeable with the cost of its upkeep, care, and preservation, as from that date.^(b) Even if the devise or legacy is contingent, it now carries the intermediate income of the property as from the testator's death, unless the will expressly bequeathes the income elsewhere.^(c)

(a) *Re Pearce, Crutchley v. Wells*, [1909] 1 Ch. 819.

(b) *Re Rooke, Jeans v. Gatehouse*, [1933] Ch. 970 (reviewing the authorities).

(c) Law of Property Act, 1925, s. 175.

Re Raine, Tyerman v. Stansfeld, [1929] 1 Ch. 716.

The rule stated in the latter part of this paragraph does not apply if the testator died before 1926 (as to which see Theobald on *Wills*, 9th ed., 147-148). Moreover, pending the contingency, the income is accumulated; if, therefore, the gift does not become vested within the period permissible for accumulations of income (§ 1686, *ante*), income accruing after that period whilst the gift remains contingent will ordinarily fall into residue (see s. 175 of the Act and *Trustee Act*, 1925, s. 31 (2)).

1996. Subject to the provisions of § 1997 *post*, a general legatee is not entitled to interest on his legacy from the testator's death.^(a) But, if no time is fixed for the payment of the legacy, interest at four per cent.^(b) is payable on a vested general legacy from a year from the testator's death^(c) until payment of the legacy;^(d) even though the legacy is payable out of a reversionary interest.^(e) If a time has been fixed by the testator for payment of the legacy, interest is payable from that date.^(f)

(a) *Benson v. Maude* (1821), 6 Madd. 15.

Re Raine, Tyerman v. Stansfield, [1929] 1 Ch. 716.

(b) R.S.C. Order LV, r. 64.

Re Davy, Hollingsworth v. Davy, [1908] 1 Ch. 61.

(c) *Hearle v. Greenbank* (1749), 3 Atk. at p. 716.

(d) *Lord v. Lord* (1867), 2 Ch. App. at p. 789, *per* Lord CAIRNS.

(e) *Walford v. Walford*, [1912] A.C. 658.

(f) *Heath v. Perry* (1744), 3 Atk. at p. 102, *per* Lord HARDWICKE, C.

Crickett v. Dolby (1795), 3 Ves. 10.

Festing v. Allen (1844), 5 Hare 573.

Re Pollock, Pugsley v. Pollock, [1943] Ch. 338.

1997. Interest is payable to the legatee on a vested general legacy from the death of the testator—

(i) if the legacy is given in satisfaction of a debt;

or,

Clark v. Sewell (1744), 3 Atk. at p. 99.

(ii) if the legacy is given to a minor to whom the testator stood *in loco parentis*; or,

Beckford v. Tobin (1749), 1 Ves. Sen. at p. 310, *per* Lord HARDWICKE, C.

Wilson v. Maddison (1843), 2 Y. & C. Ch. Cas. 372.

(iii) if the legacy is charged upon land ; *or* .

Pearson v. Pearson (1802), 1 Sch. & Lef. at p. 11, *per* Lord REDESDALE, C.

Re Waters, Waters v. Boxer (1889), 42 Ch. D. 517.

Cf. Turner v. Buck (1874), L.R. 18 Eq. 301.

(iv) if the will shows that intention.

Re Stokes, Bowen v. Davidson, [1928] Ch. 716.

Ordinarily a *contingent* general legacy does not carry interest (*Re Jones, Meacock v. Jones*, [1932] 1 Ch. at p. 646). But there are exceptions for the benefit of infant legatees if the testator is the parent of or *in loco parentis* to the infant or if the legacy is plainly intended for his support (*ibid.*). The question whether a gift to an infant carries intermediate income is important with regard to the statutory power of maintenance (§ 1774).

*Arrears of
interest*

1998. Ordinarily a legatee cannot recover more than six years' arrears of interest ; whether or not his legacy is charged upon land or rent, or secured by an express trust.^(a) But, if the legacy is payable out of a reversionary interest which cannot be realized, the legatee is entitled, when the reversion falls in, to interest as from the date at which the legacy was *primâ facie* payable.^(b)

(a) Limitation Act, 1939, ss. 18 (5), 20.

(b) *Re Blachford, Blachford v. Worsley* (1884), 27 Ch. D. 676.

It would seem that the period is extended for a legatee under disability (*ibid.* ss. 22, 31 (3)). Moreover, if the executor or trustee has been fraudulent in the matter or has retained the interest or has converted it to his own use, it would seem that there is no limiting period under the Act (*ibid.* ss. 19 (1), 20, 31 (1)). As to the period after which an action to recover a devise or a legacy is barred, see *ante*, § 67. As to the period of limitation for an annuity, see *ante*, §§ 1560, 1561.

*“ Die
without
issue ”*

1999. In a devise or bequest, the words “ die without issue ” or “ die without leaving issue ”, or “ have no issue ”, or other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, are construed to mean a want or failure of issue in the lifetime, or at the time of the

death, of such person ; unless a contrary intention appears by the testament, by reason of an entailed interest being devised to such person, or otherwise. But this rule does not apply to cases where these words import if no issue described in a preceding gift be born, or if there are no issue who obtain a vested estate by a preceding gift to such issue.

Wills Act, 1837, s. 29.

Whether the property be realty or personalty, the devisee or legatee will take an absolute interest, and the gift over be avoided, as soon as any issue of the class on whose failure the limitation is to take effect attains twenty-one (Law of Property Act, 1925, s. 134).

2000. When there is a devise or bequest to children or other relations, only those who are legitimate can take ;^(a) unless the words of the testament,^(b) or the circumstances under which the testator made the gift,^(c) show that he meant to benefit persons who are illegitimate.

Presumption that gifts confined to legitimate relations

(a) *Wilkinson v. Adam* (1813), 1 Ves. & B. at p. 462.

(b) *Ibid.* at p. 447.

(c) *Woodhouselee (Lord) v. Dalrymple* (1817), 2 Mer. 419.

Re Eve, Edwards v. Burns, [1909] 1 Ch. 796.

Re Jackson, Beattie v. Murphy, [1933] Ch. 237.

Similarly, there is a presumption against the inclusion of a mere adopted child in such a gift (Adoption of Children Act, 1926, s. 5 (2)). For the limited rights of a legitimated person to succeed under such a gift, see Legitimacy Act, 1926, s. 3, and § 1891 *ante*.

2001. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be a substitute for the prior legacy—

Presumption against double legacies

(i) if the same specific object is bequeathed, either in the same testament or in the testament and a codicil thereto ; or

Suisse v. Lowther (Lord) (1843), 2 Hare, at p. 432.

- (ii) if two pecuniary legacies of equal amount are bequeathed in the same instrument ; *or*
Manning v. Thesiger (1835), 3 My. & K. 29.
- (iii) if two pecuniary legacies of equal amount are bequeathed in different instruments for the same stated reason.

Hurst v. Beach (1820), 5 Madd. at p. 358.

*Presumption
in favour of
double
legacies*

2002. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be an addition to the prior legacy—

- (i) if two pecuniary legacies of unequal amount are bequeathed in the same or in different instruments ; *or*

Yockney v. Hansard (1844), 3 Hare, at p. 622, *per* WIGRAM, V.C.
Lee v. Pain (1845), 4 Hare, at p. 216.

- (ii) if two pecuniary legacies, of equal amount, are bequeathed by different instruments without the same reason being given for both.

Hurst v. Beach, *ubi supra*.
Lee v. Pain, *ubi supra*.

*Debtor
legatee*

2003. If a person to whom is bequeathed a general legacy, a specific legacy of a sum of money, or a share of residue, owes a debt to the deceased which is immediately payable, neither he, nor any person claiming through him,^(a) can claim what is due to him from the deceased's estate, until he has brought into account the sum which he owes to the deceased.^(b) The fact that the debt is statute-barred will not prevent the application of this rule.^(c)

(a) *Re Knapman, Knapman v. Wreford* (1881), 18 Ch. D. 300.
 (b) *Cherry v. Boulton* (1839), 4 My. & Cr. 442.

Re Taylor, Taylor v. Wade, [1894] 1 Ch. 671.

Re Abrahams, Abrahams v. Abrahams, [1908] 2 Ch. 69.

Re Dacre, Whitaker v. Dacre, [1916] 1 Ch. 344.

But the rule does not apply where the beneficiary owes the debt solely in his capacity as executor for another person (*Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682), or where the debt is owed by a partnership firm of which the legatee is a member (*Re Pennington and Owen, Ltd.*, [1925] Ch. 825). The appointment of his debtor as executor was held at law to imply a release by the testator of the executor's debt (*Re Applebee, Leveson v. Beales*, [1891] 3 Ch. at p. 429). But the equitable rule, that the matter is one of construction, is now followed; and the presumption is against an implied release, though, in accordance with the general principle, evidence to rebut the presumption will be admitted (*Re Applebee, ubi supra*; *Re Pink, Pink v. Pink*, [1912] 2 Ch. 528). Similarly, an express hotchpot clause in the will does not necessarily imply a release of the legatee's debt (*Re Horn, Westminster Bank, Ltd. v. Horn*, [1946] Ch. 254).

(c) *Courtney v. Williams* (1844), 3 Hare. 539.

Re Wheeler, Hankinson v. Hayter, [1904] 2 Ch. at p. 71.

2004. The provisions of § 2003 have no application to a devisee,^(a) a specific legatee of leaseholds or chattels,^(b) or a legatee whose legacy has been appropriated to him by the executor.^(c) *Debtor
devisee*

(a) *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212.

(b) *Re Akerman, ubi supra*.

But, in *Re Taylor, Taylor v. Wade*, [1894] 1 Ch. 671, it was held that a specific legacy can be retained for the satisfaction of a debt where it is represented by a sum of money in the hands of the executor.

(c) *Ballard v. Marsden* (1880), 14 Ch. D. 374.

An appropriation of a legacy is a setting aside by the executor, with the consent of the legatee, of a specific part of the testator's estate to satisfy a pecuniary legacy. As to this see, *post*, § 2171.

2005. A person proved to have caused the death of a testator by an act which is a criminal offence cannot claim any benefit under the latter's testament. *Beneficiary
causing
testator's
death*

Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q.B. 147 (murder).

In the Estate of Crippen, [1911] P. at p. 112 (murder).

In the Estate of Hall, Hall v. Knight and Baxter, [1914] P. 1 (manslaughter).

It has been judicially suggested in Canada that if the testament were made in favour of the criminal between commission of the

criminal act and the death of the testator, the criminal could take (*Lundy v. Lundy* (1895), 24 S.C.R. at p. 653). The act of a lunatic is not within the rule of public policy stated in the text (*Re Houghton, Houghton v. Houghton*, [1915] 2 Ch. 173; *Re Pitts, Cox v. Kilsby*, [1931] 1 Ch. 546); but it is assumed, in the absence of evidence to the contrary, that he who killed the deceased was sane at the time (*Re Pollock, Pollock v. Pollock*, [1941] Ch. 219).

*Right to
accept and
reject*

2006. Where there are two distinct gifts by the same testator to the same person, one onerous and the other beneficial, the donee may disclaim the onerous gift and take the beneficial; but if the onerous and the beneficial property are included in the same gift, the donee must, *prima facie*, take the whole or none.

Re Kensington (Baron), Longford (Earl) v. Kensington (Baron), [1902] 1 Ch. at p. 207, *per* FARWELL, J.

Douglas-Menzies v. Umphelby, [1908] A.C. 224.

Re Joel, Rogerson v. Joel, [1943] Ch. 311.

No person can be compelled to accept a devise or bequest; and no formal disclaimer is necessary; but one cannot disclaim a gift after one has accepted it (*Hurst v. Hurst* (1882), 21 Ch. D. at p. 287). A disclaimer by a devisee-trustee does not destroy the trust: another trustee will be appointed.

*Gift of
beneficiary's
property*

2007. If a testator gives to a devisee or legatee ^(a) any part of his (the testator's) own property, or makes a valid ^(b) disposition in his favour of property over which the testator has a power of appointment, ^(c) and also professes to give to another person property belonging at the time of the testator's death to the devisee, legatee, or appointee, the devisee, legatee, or appointee must elect whether he will take under the testament or against it ^(d) (see *post*, § 2008). The facts that the testator was ignorant that the property of which he was purporting to dispose belonged to the devisee, legatee, or appointee, ^(e) or that he did not intend to put the devisee, legatee, or appointee, to his election, ^(f) will not prevent the application of this rule. But the rule will not apply unless it is clear that the testator intended to dispose of property which in

fact belonged to the devisee, legatee, or appointee, at the testator's death.^(g)

- (a) *Cooper v. Cooper* (1870), 6 Ch. App. at p. 21, *per* JAMES, L.J.
- (b) *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191.
Re Nash, Cook v. Frederick, [1910] 1 Ch. at pp. 10, 11.
- (c) *Whistler v. Webster* (1794), 2 Ves. 367.
- (d) *Ker v. Wauchope* (1819), 1 Bli. at pp. 25, 26, *per* Lord ELDON, C.
- (e) *Wollaston v. King* (1869), L.R. 8 Eq. at p. 173.
- (f) *Cooper v. Cooper* (1874), L.R. 7 H.L. at p. 67.
- (g) *Wintour v. Clifton* (1856), 8 De G.M. & G. at p. 650.
Re Coole, Coole v. Flight, [1920] 2 Ch. 536.

The doctrine of Election arises chiefly in cases of dispositions by testament ; but it may also arise under deeds and contracts (see *Codrington v. Lindsay* (1873), 8 Ch. App. at p. 587). To raise a case of election, it is necessary that the intended gift of A's property to B should be such that, if the property had belonged to the intending donor, the gift would have been valid (*Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288). And persons taking in default of valid appointment a share of a fund of which the appointor has appointed part to them under a limited power cannot be compelled to compensate, out of such part, the persons to whom the share was invalidly appointed ; because such share was not the appointor's own property (*Bristow v. Warde* (1794), 2 Ves. 336). Finally, if a testator professes to give to A property of which B has no power to dispose, no case of election will be thereby raised against B (*Re Chesham (Lord), Cavendish v. Dacre* (1886), 31 Ch. D. 466). It was this principle which made it impossible for a case of election to be raised against a married woman restrained from anticipation. (See *Re Vardon's Trusts* (1885), 31 Ch. D. 275.) But the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2, now makes it impossible to attach to the enjoyment by a woman any restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man. Restraints imposed prior to 1936 are safeguarded, except that a restraint so imposed by a prior testament is void if the testator survived 1945.

2008. If the devisee, legatee, or appointee, elects Election to take under the testament, he must give up to the other beneficiary his own property which has been devised or bequeathed to such beneficiary.^(a) If he elects to take against the testament, he must compensate the other beneficiary out of the property thereby devised, bequeathed, or appointed to himself.^(b) The

amount of the compensation is to be ascertained as at the testator's death.^(c)

(a) *Gretton v. Haward* (1819), 1 Swan. at p. 420.

(b) *Ibid.* at p. 424.

Pickersgill v. Rodger (1876), 5 Ch. D. at p. 173, *per* JESSEL, M.R.

(c) *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16.

Re Williams, Cunliffe v. Williams (1915), 110 L.T. 569.

In order to give effect to these rules, the Court will order the beneficiary put to his election to convey his own property to the disappointed beneficiary, or will vest the property devised or bequeathed to the electing beneficiary in the disappointed beneficiary, as the case may be (see Seton, *Forms of Judgments* (7th ed.) II, pp. 1527, 1528).

Terms of election

2009. A person put to his election is entitled to full information as to the value of the benefit conferred on him by the testator.^(a) He may be ordered by the Court to elect within a specified time ; and, if he does not do so, he will be presumed to have elected to take against the testament.^(b)

(a) *Whistler v. Webster* (1794), 2 Ves. at p. 371.

(b) *Gretton v. Haward* (1819), 1 Swan. at pp. 447, 448.

Implied election

2010. An election, for the purposes of § 2007, may be express, or it may be implied from acts done by the person required to make the election, if he knows that he has been put to his election.

Spread v. Morgan (1865), 11 H.L.Cas. at pp. 602, 613.

Persons under incapacity

2011. A lunatic or a minor may be put to his election. But, in the case of a lunatic, the choice is made by his committee or quasi-committee, acting under the direction of the Court ;^(a) and, in the case of a minor, the Court will elect for him.^(b)

(a) Lunacy Act, 1908, s. 1.

Re Sefton (Earl), [1898] 2 Ch. 378.

(b) *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. at p. 552.

Satisfaction of debts by legacies

2012. If a legacy is bequeathed to a creditor of the testator, of an amount equal to or greater than the debt due from the testator, there is a presumption

that the legacy is intended by the testator to satisfy the debt ; and the creditor will be bound to elect whether he will claim the debt or the legacy.^(a) But this presumption does not arise—

- (i) if a declaration to the contrary appears in the testament ;^(b) *or*
- (ii) if the debt is incurred after the execution of the testament ;^(c) *or*
- (iii) if the legacy is of less amount than the debt,^(d) or of an uncertain amount ;^(e) *or*
- (iv) if the legacy is payable at a later period than the debt,^(f) or is contingent ;^(g) *or*
- (v) if there is a direction in the testament that the testator's debts shall be paid.^(h)

And the presumption does not arise when a testator devises real estate to a creditor.⁽ⁱ⁾

- (a) *Talbott v. Shrewsbury (Duke)* (1714), Prec. Ch. 394.
Barret v. Beckford (1750), 1 Ves. Sen. 519.
Williamson v. Naylor (1838), 3 Y. & C. Ex. at p. 210, n.
- (b) *Wallace v. Pomfret* (1805), 11 Ves. 542.
- (c) *Thomas v. Bennet* (1725), 2 P. Wms. at p. 343.
- (d) *Thynne (Lady) v. Glengall (Earl)* (1848), 2 H.L.Cas. at p. 153.
- (e) *Ibid.* at p. 154.
- (f) *Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516.

But in *Re Rattenberry*, [1906] 1 Ch. 667, it was held that the presumption of satisfaction was not excluded either by the fact that the legacy was not payable until one year after the death, or by the appointment of the creditor as executrix.

- (g) *Crichton v. Crichton*, [1895] 2 Ch. 853.
- (h) *Richardson v. Greese* (1743), 3 Atk. 65.
Re Huish, Bradshaw v. Huish (1889), 43 Ch. D. 260.
- (j) *Eastwood v. Vinke* (1731), 2 P. Wms. 613.

It is probable also that the presumption does not arise in the case of a legacy of a specific chattel ; but there appears to be no decision on the point.

2013. If a father, or other person who has placed himself *in loco parentis* to a child,^(a) gives by his testa- *Ademption of portions-legacies*

ment a legacy or share of residue by way of portion to such child^(a) and, subsequently, during his lifetime, advances or covenants to advance a portion^(b) to or for the benefit of such child, whether or not of an amount equal to the testamentary provision, and whether or not it is settled in the same way, there is a presumption that the testamentary gift is adeemed, (i.e. fails), wholly or *pro tanto*;^(c) and, in the case of a covenant to advance a portion, this presumption is not rebutted merely by a direction in the testament that the testator's debts shall be paid.^(d)

(a) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140.

Montefiore v. Guedalla (1859), 1 De G.F. & J. 93.

Re Ashion, Ingram v. Papillon, [1897] 2 Ch. at pp. 577-8. (If it is contended that the mother is *in loco parentis* for the purposes of this presumption, the burden of proof is on those who put forward the contention (*ibid.* at p. 578).)

A devise of real estate is not a portion for this purpose (*Davys v. Boucher* (1839), 3 Y. & C. (Ex.) 397).

(b) *Taylor v. Taylor* (1875), L.R. 20 Eq. 155.

Re Scott, Langton v. Scott, [1903] 1 Ch. 1.

These two cases show that a payment made by a father to a child is not a portion unless it is made to establish the child permanently in life. But a legacy given by a father is, *prima facie*, a portion (*Ex parte Pye, Ex parte Dubost, ubi supra*, at p. 153).

(c) *Ex parte Pye, Ex parte Dubost, ubi supra*.

Durham (Earl) v. Wharion (1836), 3 Cl. & Fin. at pp. 154-6.

Pym v. Lockyer (1841), 5 My. & Cr. 29.

Hopwood v. Hopwood (1859), 7 H.L.Cas. at p. 747.

The presumption applies equally to testamentary appointments (*Re Peel's Settlement, Biddulph v. Peel*, [1911] 2 Ch. 165). But it may be displaced by the nature of the legacy; see *Re Vaux, Nicholson v. Vaux*, [1939] Ch. 465 (discretionary trust of residue).

(d) *Cooper v. Macdonald* (1873), L.R. 16 Eq. at pp. 267, 268.

In the case of portions-legacies, the claim of ademption can only be raised in favour of other persons to whom the testator stood *in loco parentis* (*Re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230).

Satisfaction
of portion

2014. If a father, or other person who has placed himself *in loco parentis* to a child, has charged land with a portion for such child,^(a) or has covenanted to

give a portion to a child,^(b) and subsequently advances a portion to such child during his lifetime,^(c) or bequeaths a portion by his testament,^(d) there is a presumption that the later gift was intended to satisfy the obligation previously incurred, either wholly or *pro tanto*; and the child must elect between the enforcement of his rights under the obligation, and his rights under the later gift.^(e) But a devise will not satisfy an obligation to pay money, and a legacy will not satisfy an obligation to transfer land ;^(f) and a clear direction in the testament that the testator's debts are to be paid will rebut the presumption of satisfaction.^(g)

(a) *Jesson v. Jesson* (1691), 2 Vern. 255.

(b) *Thynne (Lady) v. Glengall (Earl)* (1848), 2 H.L.Cas. 131.
Re Lawes; *Lawes v. Lawes* (1881), 20 Ch. D. 81.

(c) *Jesson v. Jesson*, *ubi supra*.

(d) *Copley v. Copley* (1711), 1 P. Wms. 147.
Onslow v. Mitchell (1812), 18 Ves. 490.

It is otherwise if the legacy is obviously not intended as a portion (see *Cooper v. Cooper* (1873), 8 Ch. App. 813). Slight differences of limitation of the two provisions will not, but substantial differences will, rebut the presumption (*Re Tussaud's Estate*, *Tussaud v. Tussaud* (1878), 9 Ch. D. 363).

(e) *Thynne (Lady) v. Glengall (Earl)* (1848), 2 H.L.Cas. 131.
Chichester (Lord) v. Coventry (1867), L.R. 2 H.L. 71.

(f) *Bellasis v. Uthwatt* (1737), West temp. Hard. at p. 281.
Chichester (Lord) v. Coventry, *ubi supra*, at p. 96.

(g) *Chichester (Lord) v. Coventry*, *ubi supra*, at p. 85.
Montagu v. Sandwich (Earl) (1886), 32 Ch. D. 525.

A person not being a direct beneficiary of the testator's bounty will not be bound by the doctrine; even though, indirectly, he gets the advantage of the double provision (*Re Blundell*, *Blundell v. Blundell*, [1906] 2 Ch. 222).

2015. When the presumptions of ademption or satisfaction specified in §§ 2012-2014 are raised, the Court will admit parol evidence of the testator's intentions in order to rebut or maintain them.^(a) Parol evidence of words or conduct contemporaneous with a transaction not evidenced by writing may also

Evidence to rebut presumption

be admitted to prove the intention of the parties to it.^(b)

- (a) *Kirk v. Eddowes* (1844), 3 Hare, at pp. 516-17.
Re Shields, Corbould-Ellis v. Dales, [1912] 1 Ch. 591.
- (b) *Kirk v. Eddowes*, *ubi supra*, at p. 516, *per* SHADWELL, V.C.

*Ademption of
non-portions
legacies*

2016. A legacy bequeathed to a legatee to whom the testator is neither a father nor *in loco parentis*, is not presumed to be adeemed by a subsequent advance to such legatee by the testator ; unless both the legacy and the advance were given for the same specified purpose, or to fulfil the same moral obligation, or the intention that the advance should adeem the legacy otherwise appears.^(a) Evidence of the circumstances in which the advance was made, and of contemporaneous declarations by the testator, is admissible to establish or rebut the presumption.^(b)

- (a) *Pankhurst v. Howell* (1870), 6 Ch. App. at pp. 137-8, *per* JAMES, L.J.
Re Fletcher, Gillings v. Fletcher (1888), 38 Ch. D. 373.
Re Eardley's Will, Simeon v. Freemanile, [1920] 1 Ch. 397.
- (b) *Re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. at p. 556, *per* LORD SELBORNE.
Re Eardley's Will, Simeon v. Freemanile, *supra*, at p. 406.

*Legacies to
executors*

2017. If a legacy is given to an executor, it is presumed that the gift is made to him as a condition of his acting as executor ; and he will not be entitled to it if he refuses to act as executor.^(a) But this presumption may be rebutted by the express terms of the testament, by expressions used in the testament indicating that the gift is not made to the executor on that condition,^(b) or even perhaps by parol evidence.^(c) And the presumption does not apply to a gift of residue,^(d) or of a reversionary interest.^(e)

- (a) *In re Appleton, Barber v. Tebbit* (1885), 29 Ch. D. 893.
- (b) *Compton v. Bloxham* (1845), 2 Coll. 201.
Re Denby (1861), 3 De G.F. & J. 350.
Fewis v. Lawrence (1869), L.R. 8 Eq. 345.
- (c) *Re Appleton, ubi supra*, at p. 895, *per* COTTON, L.J., but cf. FRY, L.J., at p. 898.

(d) *Griffiths v. Pruett* (1840), 11 Sim. 202.

(e) *Re Reeve's Trusts* (1877), 4 Ch. D. 841.

It is doubtful whether the presumption would be applied to a devise of real property.

2018. A devise or a legacy to a number of persons will be interpreted as a gift to a class, if (i) these persons are included under some general description,^(a) and (ii) it appears that the testator intends to benefit the body of persons as a whole rather than the individuals belonging to it.^(b) *Class gifts*

(a) *Kingsbury v. Walter*, [1901] A.C. at p. 192, per Lord DAVEY.

(b) *Ibid.* at p. 191, per Lord MACNAGHTEN.

Even a gift to persons not comprehended under one general description (e.g. "To A and the children of B") may operate as a class gift if the will clearly shows that intention (*ibid.* at p. 193, per Lord DAVEY).

2019. A gift to a class is, *primâ facie*, a gift to the members of the class existing at the testator's death, if any such are then in existence. If none are then in existence, it is, *primâ facie*, a gift to all the members of the class who shall come into existence. *Date for determination of class*

Viner v. Francis (1789), 2 Cox, Eq. Cas. 190.

Harris v. Lloyd (1823), Turn. & R. 310.

Mortimore v. Mortimore (1879), 4 App. Cas. 448.

Re Powell, Crosland v. Holliday, [1898] 1 Ch. 227.

The above applies to an immediate class gift. It is one of the "rules of convenience" designed to meet the practical difficulty that executors cannot distribute a class gift until they know the number of members of the class. Hence the presumption that the testator intended the class to close at the time of distribution (*Re Deloitte, Griffiths v. Allbeury*, [1919] 1 Ch. 209). If the gift (whether of capital or income) is made payable to the members of the class on the attainment of a certain age or marriage, the class (in the absence of indications in the testament of a contrary intention) remains open till the first member of the class attains this age or marries (*Andrews v. Partington* (1791), 3 Bro. C.C. 401; *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322, criticizing *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266), or until it is necessary to divide the fund (*Re Faux, Taylor v. Faux* (1915) 31 T.L.R. 289). As to the destination of any intermediate income, see §§ 1995-1997, *ante*. If in a gift to the children of X the testator names a definite number

of such children, and such number is incorrect, the mistake will be disregarded (*Re Groom, Booty v. Groom*, [1897] 2 Ch. 407).

Lapse

2020. Subject to §§ 2021, 2022, and §§ 2024, 2025, *post*, a devise, legacy, or appointment by testament or codicil lapses if the devisee, legatee, or appointee predeceases the testator.

Bl. *Comm.* II, 513.

Oke v. Heath (1748), 1 Ves. Sen. at p. 139.

At common law, it would seem that there is lapse also if the deaths are simultaneous. For deaths after 1925, however, it appears that *commorientes* are assumed to have died in order of seniority (Law of Property Act, 1925, s. 184; *Hickman v. Peacey*, [1945] A.C. 304; see also § 13, *ante*).

*Gifts to issue
of testator*

2021. A devise, legacy, or appointment by testament or codicil made in the exercise of a power of appointment which may be exercised in any manner which the testator may think proper, to a child or other issue of the testator, of an interest in real or personal property not determinable at or before the death of such child or other issue, does not lapse, if the child or other issue predeceases the testator leaving issue, and any of such issue are living at the death of the testator. It devolves as if the child or other issue had died immediately after the testator, unless a contrary intention appears by the testament.

Wills Act, 1837, ss. 27 and 33.

Re Hone's Trusts (1883), 22 Ch. D. 663.

Re Scott, [1901] 1 K.B. 228.

Re Meredith, Davies v. Davies, [1924] 2 Ch. 552.

The issue living at the death of the testator need not have been living at the death of the beneficiary (*In the Goods of Parker* (1860), 1 Sw. & Tr. 523). But this section of the Wills Act does not apply to appointments made in the exercise of special powers of appointment (*Holyland v. Lewin* (1884), 26 Ch. D. 266); nor does it apply to a gift to children or other issue as a class (*Re Harvey's Estate, Harvey v. Gillow*, [1893] 1 Ch. 567); nor to a gift contingent upon reaching some age which the donee fails to reach (*Re Wolson, Wolson v. Jackson*, [1939] Ch. 780). It follows from the wording of s. 33 of the Wills Act, that the surviving issue do not necessarily benefit by the bounty of the original

testator, which may pass by the testament or other disposition of the original beneficiary, if appropriately worded (*Johnson v. Johnson* (1843), 3 Hare 157; *Re Hone's Trusts* (1883), 22 Ch. D. 663).

2022. If there is a devise or a legacy to two or more persons jointly (*ante*, § 1710), and one or more of such persons predeceases the testator, the gift operates simply as a devise or legacy of the property to the survivor or survivors. *Joint testamentary gifts*

Morley v. Bird (1798), 3 Ves. 628.

In the case of a joint interest in land, the property will ordinarily be held upon the statutory trusts for sale for the benefit of the joint tenants (Law of Property Act, 1925, s. 36 (1)).

2023. If there is a devise or a legacy to two or more persons in common (*ante*, §§ 1718, 1719), and one or more of such persons predeceases the testator, his or their share will (subject to § 2021 *ante*) lapse;^(a) unless (i) the testator has indicated an intention that the survivor or survivors shall take such share,^(b) or (ii) the devise or legacy has been given to the beneficiaries as a class.^(c) *Testamentary gifts in common*

(a) *Baxter v. Losh* (1851), 14 Beav. 612.

(b) *Mackinnon v. Peach* (1838), 2 Keen, 555.

Whether the survivor or survivors in such a case take not only the original share of a deceased co-owner, but also any shares accrued to him by reason of the prior decease of another co-owner, is a question to be decided upon the construction of the testament as a whole. Unless the Court can see some indication of an intention that accrued shares shall accrue as well as the original shares, only the original shares will accrue (*Re Scaife, Ex parte West* (1784), 1 Bro. C.C. 575; *Goodwin v. Finlayson* (1858), 25 Beav. 65; *Dutton v. Crowdy* (1863), 33 Beav. 272).

(c) *Fell v. Biddolph* (1875), L.R. 10 C.P. 701.

Re Coleman and Farrom (1876), 4 Ch. D. 165.

Re Jackson, Shiers v. Ashworth (1883), 25 Ch. D. 162.

A testamentary gift of land to tenants in common operates as a gift to the trustees or executors of the will to be held upon the statutory trusts for the tenants in common (Law of Property Act, 1925, s. 34 (3)).

*Devises of
entailed
interests*

2024. If a devise has been made to a devisee for an entailed interest, or an interest in quasi-tail, and the devisee predeceases the testator, leaving issue who survive the testator and are inheritable under the entail, the devise does not lapse, but takes effect as if the devisee had died immediately after the testator ; unless a contrary intention appears by the testament.

Wills Act, 1837, s. 32.

By "inheritable" issue is, presumably, meant issue capable of inheriting the entailed interest. In the case provided for by this paragraph, the issue need not necessarily benefit by the devise ; because the original devisee, by an appropriately worded testament, may have devised or bequeathed it to strangers (Law of Property Act, 1925, s. 176 (1)). But, to have this effect, the testament must have been executed or republished after 1925 (*ibid.* (4)).

*Gifts to
fulfil moral
obligations*

2025. If a testator, when he gave a legacy or made a devise, clearly intended to discharge a moral obligation, whether legally binding or not, and if that obligation still exists at the testator's death, the death of the legatee or devisee before the testator will not cause the legacy to lapse.

Philips v. Philips (1844), 3 Hare, at p. 281.

Re Sowerby's Trusts (1856), 2 K. & J. 630.

Stevens v. King, [1904] 2 Ch. 30.

The cases all refer to legacies or testamentary appointments of personalty ; but there seems no reason why the same principle should not apply to a devise. Where the doctrine applies, the property bequeathed or devised goes to the representatives of the original legatee or devisee, as part of the latter's assets (*Stevens v. King*, *ubi supra*).

*Testator may
provide
against
lapse*

2026. There will be no lapse of a legacy or devise if the will shows a clear intention to the contrary and indicates a person who is to take in case the legatee or devisee predeceases the testator.^(a) A mere statement of a wish that the provision shall take effect whether or not the testator predeceases the legatee or devisee, without such indication, will not prevent a lapse.^(b)

(a) *Sibley v. Cook* (1747), 3 Atk. 572.

(b) *Re Ladd, Henderson v. Porter*, [1932] 2 Ch. 219.

Thus a legacy sometimes includes words which substitute the legatee's personal representatives in case he predecease the testator.

2027. A person who is suffering from illness may make a *donatio mortis causâ* of a chattel in contemplation of his death,^(a) though not necessarily in expectation of immediate death through the illness from which he is suffering.^(b) He cannot make such a gift in contemplation of suicide.^(c) *Donatio mortis causâ*

(a) *Duffield v. Elwes* (1827), 1 Bli. (N.S.) 497.

Staniland v. Willott (1852), 3 Mac. & G. 664.

Cain v. Moon, [1896] 2 Q.B. at p. 286.

Re Craven's Estate, Lloyds Bank v. Cockburn (No. 1), [1937] Ch. at p. 426.

(b) *Cain v. Moon*, *ubi supra*, at p. 286.

Re Richards, Jones v. Rebbeck, [1921] 1 Ch. 513.

(c) *Agnew v. Belfast Banking Co.*, [1896] 2 I. R. 204.

Re Dudman, Dudman v. Dudman, [1925] Ch. 553.

Quære : Can a good *donatio mortis causâ* be made by a donor who is not suffering from illness? As long as the donor contemplated death, the gift will not be invalidated if he dies from a cause other than the disease from which he was suffering when he made it (*Wilkes v. Allington*, [1931] 2 Ch. 104).

2028. In every *donatio mortis causâ* there must be an intention to make an immediate gift,^(a) subject to the conditions (i) that the title to the chattel given shall not pass absolutely to the donee till the death of the donor,^(b) and (ii) that, if the donor resumes possession of the chattel,^(c) or recovers from the illness in contemplation of which the gift was made,^(d) the gift shall be void. In the last case, the donee till re-delivery holds the chattel as trustee for the donor.^(e) *Intention of gift*

(a) *Re Patterson's Estate, Mitchell v. Smith* (1864), 4 De G.J. & Sm. 422.

(b) *Tate v. Hilbert* (1793), 2 Ves. at p. 119.

(c) *Bunn v. Markham* (1816), 7 Taunt. at pp. 231, 232, *per* GIBBS, C.J.

Cant v. Gregory (1894), 10 T.L.R. 584.

The mere fact that the donor has, at the donee's request, taken it back for the purpose of safe custody, will not revoke the gift (*Re Hawkins, Watts v. Nash*, [1924] 2 Ch. 47).

(d) *Tate v. Leithead* (1854), Kay, at p. 662.

(e) *Staniland v. Willott* (1852), 3 Mac. & G. 664.

*Necessity
for delivery*

2029. A *donatio mortis causâ* will not be valid until the chattel is actually delivered by the donor^(a) or his agent^(b) to the donee or his agent,^(c) with intent to pass the ownership.^(d) A bailment to the donee, followed subsequently by a statement that the thing bailed is to be the property of the donee in the case of donor's death through the illness from which he is suffering, is a sufficient delivery for this purpose.^(e)

(a) *Ward v. Turner* (1752), 2 Ves. Sen. at p. 442.

Re Wasserberg, Union of London and Smiths Bank, Ltd. v. Wasserberg, [1915] 1 Ch. 195.

(b) *Miller v. Miller* (1735), 3 P. Wms. 356.

Re Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. at p. 896.

(c) *Farquharson v. Cave* (1846), 2 Coll. at pp. 367, 368.

(d) *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 812.

(e) *Gain v. Moon*, [1896] 2 Q.B. 283.

Difficult questions may arise as to what constitutes a sufficient delivery (e.g. *Re Wasserberg, supra*; *Re Craven's Estate, Lloyds Bank v. Cockburn* (No. 1), [1937] Ch. at pp. 426-428; *Delgoffe v. Fader*, [1939] Ch. at pp. 932, 933). A delivery which, though it does not pass the property, passes the effective dominion over it and evinces unmistakably the intention of the donor to pass the property to the donee, entitles the latter to apply to a Court of Equity to complete the gift (*Duffield v. Elwes* (1827), 1 Bli. (N.S.) at pp. 543-4; *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. at p. 83, *per* LINDLEY, L.J.).

*Gift of
thing in
action*

2030. A thing in action may be the subject of a *donatio mortis causâ*. If the thing in action is a negotiable instrument, its delivery to the donee will be sufficient for the purposes of § 2029;^(a) even though it is payable to order and not indorsed.^(b) If the thing in action is not embodied in a negotiable instrument, the delivery of a document which acknowledges the receipt of a sum of money payable to the donor, expresses the terms on which it is payable, and shows what is the contract between the donor

and the party liable to him, will be sufficient delivery for such purposes.^(c)

- (a) *Miller v. Miller* (1735), 3 P. Wms. 356 (bank notes).
- (b) *Re Mead, Austin v. Mead* (1880), 15 Ch. D. 651 (bills of exchange).
Veal v. Veal (1859), 27 Beav. 303 (promissory notes).
Rolls v. Pearce (1877), 5 Ch. D. 730
Clement v. Cheesman (1884), 27 Ch. D. 631
Re Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. at pp. 895, 897
- (c) *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. at p. 82.
Re Weston, Bartholomew v. Menzies, [1902] 1 Ch. at p. 685.

The following documents have been held to comply with this test : banker's deposit notes (*Re Dillon, Duffin v. Duffin, ubi supra* ; *Hudson v. Spencer*, [1910] 2 Ch. 285) ; bonds (*Snellgrove v. Bailly* (1744), 3 Atk. 214) ; mortgage deeds (*Duffield v. Elwes* (1827), 1 Bli. (N.S.) 497) ; policies of insurance (*Amis v. Witt* (1863), 33 Beav. 619) ; Post Office Savings Bank books, as to the cash deposits therein contained (*Re Weston, Bartholomew v. Menzies*, [1902] 1 Ch. 680 ; *In re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394) ; bonds payable to bearer (*Re Wasserberg, Union of London and Smiths Bank, Ltd. v. Wasserberg*, [1915] 1 Ch. 195) ; a Victory Bond (*Re Richards, Jones v. Rebbeck*, [1921] 1 Ch. 513). On the other hand, the delivery of a bank deposit account book (*Delgoffe v. Fader*, [1939] Ch. 922) or a mere receipt for money is not sufficient (*Moore v. Darton* (1851), 4 De G. & Sm. 517, at p. 530), unless the document is more than a receipt, and contains the terms of the contract (*ibid.*). Similarly, the delivery of an I.O.U. is not sufficient (*Duckworth v. Lee*, [1899] 1 I.R. 405).

2031. When the delivery of a document does not, either at law or in equity, pass the property in the thing in action evidenced by it,^(a) or when a document is merely an authority given by the donor which is revocable by his death,^(b) its delivery to a donee will not be sufficient for the purposes of § 2029 *ante*.

Delivery of evidences of title

- (a) *Ward v. Turner* (1752), 2 Ves. Sen. 431 (receipts for South Sea annuities).
Moore v. Moore (1874), L.R. 18 Eq. 474 (certificates of railway stock).
Re Weston, Bartholomew v. Menzies, [1902] 1 Ch. 680 (certificates of Building Society shares).
Re Andrews, Andrews v. Andrews, [1902] 2 Ch. 394 (certificate of investment in Government stock).

- (b) *Hewitt v. Kaye* (1868), L.R. 6 Eq. 198 } (cheques drawn by donor
Re Beak's Estate, Beak v. Beak (1872), } and not presented in his
 L.R. 13 Eq. 489 } lifetime).
Re Mead, Austin v. Mead (1889), 15 Ch. D. 651 (cheque to withdraw
 deposit).
Re Beaumont, Beaumont v. Esobank, [1902] 1 Ch. 889 (cheque drawn
 by deceased on his account which was overdrawn, and not paid
 before his death).
Re Swinburne, Sutton v. Featherley, [1926] Ch. 38.

The question whether a valid *donatio mortis causâ* is made by the delivery of any given document, which either creates or evidences a thing in action, is difficult, because, in recognizing or refusing to recognize such delivery as effectual for this purpose, the Courts have not followed any one principle. The principles upon which the Courts have recognized delivery as effectual, are set out in § 2030 ; and the vagueness of the test applied to non-negotiable things in action obviously leaves a good deal of uncertainty, in the case of any given document which has not been adjudicated upon by the Courts. The principles upon which the Courts have refused to recognize delivery as effectual are dealt with in § 2031. They seem to be (i) that, though some other mode of transfer be prescribed by law, in equity a delivery of the evidentiary document (complying with § 2030, *ante*) may suffice ; (ii) that a mere authority to pay (even though embodied in a document, such as a cheque drawn by the donor on his bank and not subsequently negotiated) is not a thing in action which admits of transfer, because the authority is revoked by the donor's death.

*Donatio
mortis causâ
on trust*

2032. A *donatio mortis causâ* may be made to the donee as trustee for another person, or for the carrying out of particular purposes.

Blount v. Burrow (1792), 4 Bro. C.C. at p. 75.

Hills v. Hills (1841), 8 M. & W. 401.

Treasury Solicitor v. Lewis, [1900] 2 Ch. at p. 817.

*Usually does
not pass
to personal
representative of
owner*

2033. The death of the donor of a *donatio mortis causâ* does not vest the property in the subject-matter of such gift in his representative (unless upon trust for the donee), but perfects the title of the donee ;^(a) and no assent on the part of the representative is required to complete the gift.^(b) But the property given may be taken to pay the creditors of the deceased, in the event of a deficiency of the donor's assets.^(c)

(a) *Tate v. Hilbert* (1793), 2 Ves. at p. 120.

(b) *Ibid.*

If the delivery is not sufficient to pass a legal title but is sufficient in equity, it would seem that the bare legal title vests in the donor's representative who is then compellable to transfer it to the donee (*Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. per COTTON, L.J., at p. 82; *Delgoffe v. Fader*, [1939] Ch. per LUXMOORE, L.J., at pp. 927, 928).

(c) *Tate v. Leithead* (1854), Kay, at p. 659.

Re Korvine's Trust, Levashoff v. Block, [1921] 1 Ch. at p. 348.

2034. Land cannot be made the subject of a *donatio mortis causa*.

Duffield v. Elwes (1827), 1 Bli. (N.S.) 497, per Lord ELDON.

*Land not
subject to
donatio
mortis causa*

This case decided that a delivery of mortgage deeds may constitute an effective *donatio mortis causa* of the mortgage debt (*ante* § 2030). But an attempt to deliver the land itself would seem to be ineffectual under the Law of Property Act, 1925, s. 51 (1).

SECTION II INTESTATE SUCCESSION

TITLE I—GENERAL

*Automatic
statutory
trust for sale*

2035. A person may die wholly or partially intestate. If he dies after the year 1925, all the property belonging to him in his own right which has not been effectively disposed of by his testament, and which is not extinguished by his death, becomes subject to a statutory trust for sale.^(a) That is to say, the representative immediately holds it on trust to sell the real estate, and call in, sell, and convert such part of the personal estate as does not consist of money ; with power, at his absolute discretion, to postpone such sale or/and conversion. The proceeds of sale, together with the part of the estate which remains unsold and is not required for administration purposes, form the residuary estate of the intestate, which must, after payment of the funeral, testamentary (if any), and administration expenses, and all debts, be distributed according to the rules of intestate succession, set out in Titles II and III, *post*, of this Section.^(b) But a reversionary interest must not be sold, without special reason, until it falls into possession ; and “personal chattels” must not be sold at all, unless they are required for administration purposes owing to the want of other assets.^(c)

(a) Administration of Estates Act, 1925, ss. 33, 49.
Re Sullivan, Dunkley v. Sullivan, [1930] 1 Ch. 84.
Re Thornber, Crabtree v. Thornber, [1937] Ch. 29.

(b) Administration of Estates Act, 1925, ss. 45-7.

(c) *Ibid.* s. 33.

*Succession by
person caus-
ing death*

2036. The rule that a person proved to have caused the death of a testator by an act which is a

criminal offence cannot claim any benefit under the testament (*ante*, § 2005) is applicable also to intestate succession.

Re Sigsworth, Bedford v. Bedford, [1935] Ch. 89.

2037. In case of intestacy, total or partial, as in case of complete testacy, the representative is not bound to distribute the estate of the deceased before the expiration of one year from the death. *Representative has a year for administration*

Administration of Estates Act, 1925, s. 44.

Note

It should be carefully remembered that, so far as intestate succession is concerned, the Administration of Estates Act, 1925, only applies where the intestate died after 1925 (see s. 54 of the Act). But the number of claims under pre-1926 intestacies must, owing to the operation of the statutes of limitation (*ante*, § 67), be rapidly diminishing; and it has not been thought necessary to deal with them. The rules of distribution under pre-1926 intestacies will be found set out in the second edition of this work, at pp. 1295-1328.

TITLE II—DISTRIBUTION OF THE RESIDUARY ESTATE

*Rights of
surviving
spouse*

2038. A surviving spouse takes in any event all the "personal chattels" together with a sum of one thousand pounds, free of death duties and costs, with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated. In addition, he or she takes a life interest in half or the whole of the rest of the estate, according as to whether the deceased leaves or does not leave issue. If issue were living at the death, and if the statutory trusts for them fail or determine during the lifetime of a surviving spouse, that spouse then takes a life interest in that half also. If the deceased leaves no relations as described in §§ 2039–2045, 2051, a surviving spouse takes the whole residuary estate absolutely.

Administration of Estates Act, 1925, s. 46 (1) (i).

The account of the rights of issue and other relations in §§ 2039–2045 must be read as subject to the rights of the surviving spouse as described in this paragraph. "Personal chattels" are specifically defined by the Act (s. 55 (1) (x)) for this purpose: e.g. articles of personal or domestic use or ornament are included but not money nor any chattels used for business purposes (see *Re Ogilby, Ogilby v. Wentworth-Stanley*, [1942] Ch. 288; *Re Whitby, Public Trustee v. Whitby*, [1944] Ch. 210).

*Rights of
the issue*

2039. If the intestate leaves issue, but no spouse, or both issue and spouse, the estate is held on the statutory trusts in favour of the issue of the deceased. In the former case the whole, in the latter case half, of the estate is held in trust for them. In the latter case also, the half in which the spouse takes a life interest falls within the statutory trusts for the issue on the death of the spouse.

Administration of Estates Act, 1925, s. 46 (1) (i) (ii).

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If, however, statutory trusts for the issue fail or determine in the lifetime of a surviving spouse, then the spouse takes a life interest in their half. The statutory trusts may fail or determine owing to no issue attaining, in the event, as an "absolutely vested interest" (see *post*, § 2050).

2040. If the intestate leaves no issue but both parents, the residuary estate is held in trust for the father and mother absolutely, in equal shares. *Rights of father and mother*

Administration of Estates Act, 1925, s. 46 (1) (iii).

2041. If the intestate leaves no issue but one parent, the residuary estate is held in trust for such surviving parent absolutely. *Rights of sole surviving parent*

Administration of Estates Act, 1925, s. 46 (1) (iv).

2042. If the intestate leaves no issue or parent, the estate is held in trust for the brothers and sisters of the intestate. *Rights of brothers and sisters*

Administration of Estates Act, 1925, s. 46 (1) (v).

The issue of a deceased brother or sister represent him or her (*post*, § 2051).

2043. If the intestate leaves no brothers or sisters or their issue, or if no brothers or sisters or their issue take an absolutely vested interest (*post*, §§ 2050, 2051), then the estate is held in trust for grandparents, in equal shares if there more survive than one. *Rights of grandparents*

Administration of Estates Act, 1925, s. 46 (1) (v).

2044. If there are no grandparents, the estate is held on the statutory trusts for the uncles and aunts of the intestate. *Rights of uncles and aunts*

Administration of Estates Acts, 1925, s. 46 (1) (v).

2045. In the case of brothers, sisters, uncles, and aunts of the deceased, relations of the whole blood to the intestate are preferred to those of the half blood. *Whole blood preferred to half blood*

Administration of Estates Act, 1925, s. 46 (1) (v).

*Adopted
children*

2046. Children adopted under the Adoption of Children Act, 1926, do not thereby lose any right of intestate succession in their family of birth, nor do they gain any such right in their adoptive family.

Adoption of Children Act, 1926, s. 5 (3).

*Effect of the
Legitimacy
Act, 1926*

2047. Only legitimate relations can (generally) succeed on an intestacy ; but among these are included those legitimated by the marriage of their parents under the Legitimacy Act, 1926 (*ante*, §§ 1889-1890). These can succeed to any property^(a) except a dignity or title of honour.^(b) And an illegitimate child, or his issue if he is dead, may succeed to his mother who dies intestate without leaving any legitimate issue her surviving. Conversely, a surviving mother of an illegitimate child who has died wholly or partially intestate, may take any interest in his or her property to which she would have been entitled had he or she been legitimate and had she (the mother) been his or her only surviving parent.^(c)

(a) Legitimacy Act, 1926, s. 3 (1) (a). If the legitimated child is dead, his issue may take in his stead (*ibid.*).

(b) *Ibid.* s. 10. (S. 3 (3) also provides that, where property is limited in such a way that it would have devolved (as nearly as the law permits) along with a dignity or title of honour, then such property shall devolve as if the Act had not been passed.)

(c) *Ibid.* s. 9 (1) and (2).

*Bona
vacantia*

2048. If there are no uncles or aunts, or if no uncles or aunts attain to an absolutely vested interest (*post*, § 2050), then the residuary estate of the intestate is held in trust for a surviving spouse absolutely. But, if there is no spouse, it goes to the Crown or to the Duchy of Lancaster, or the Duke of Cornwall for the time being, as the case may be, as *bona vacantia*. The Crown or the said Duchy or the said Duke may, out of the whole or any part of the property devolving on them respectively, provide for dependants, whether

kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

Administration of Estates Act, 1925, s. 46 (1) (vi).

Re Mason, [1929] 1 Ch. 1.

2049. Where a surviving spouse is entitled to a life interest in the whole or part of the residuary estate of an intestate, the personal representative may, with the consent of such spouse, redeem such life interest by paying its capital value to the tenant for life ; and, thereupon, the residuary estate may be distributed free from the life interest. For this purpose the personal representative may apply any part of the residuary estate. He may also, on the security of the whole or part of that residuary estate, raise the sum of one thousand pounds to which the surviving spouse is entitled under § 2038 *ante*.

Powers of representative with regard to rights of surviving spouse

Administration of Estates Act, 1925, s. 48.

If the surviving spouse is the sole personal representative, the leave of the Court must be obtained in order that the course may be adopted which this section allows (*ibid.*).

2050. The interests of issue, brothers, sisters, uncles, and aunts do not become absolutely vested until they attain the age of twenty-one or marry under that age. Until that time, their interests are contingent ; and the personal representative will apply out of it such income as is necessary towards their maintenance, and accumulate at compound interest the rest of the income to which they are entitled. He may also permit any minor contingently interested to have the use of any personal chattels, subject to any conditions he may see fit to impose. If the trusts for issue, or for brothers and sisters, or for uncles and aunts, fail by reason that no beneficiary thereunder lives to attain an absolutely vested interest, then (subject in the case of issue to the rights of a

Manner in which residuary estate is to be held on the statutory trusts

surviving spouse (*ante*, § 2038)) the estate, together with all its accumulations, devolves as though no such beneficiary had outlived the testator, and goes accordingly to the next persons entitled under the intestacy.

Administration of Estates Act, 1925, ss. 46, 47.

*Issue
represent
their
ancestor*

2051. Subject to § 2054 *post*, the issue who survive the intestate of deceased children, brothers, sisters, uncles, and aunts who predecease the intestate, take the share that would have been taken by their parent, if alive at the intestate's death. The division is *per stirpes*, that is to say, according to the number of stocks, and not according to the number of issue.

Administration of Estates Act, 1925, s. 47 (1) (i), (3).

The shares of such issue will be held for them upon the statutory trusts (*ante*, § 2050).

*Succession to
a legitimated
person*

2052. Where a legitimated person, or a child or remoter issue of a legitimated person, dies intestate in respect of all or any of his property, the same persons are entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate.

Legitimacy Act, 1926, s. 4.

*Position of
spouse and
issue of illegitimate
person dying
before
marriage of
his parents*

2053. Where an illegitimate person dies after the commencement of the Legitimacy Act, 1926, and before the marriage of his parents, leaving any spouse, children, or remoter issue living at the date of such marriage, then, for purposes of succession by or to such spouse, children, or remoter issue, the illegitimate person is deemed to have been legitimated at the date of the marriage.

Legitimacy Act, 1926, s. 5.

The reference to the spouse is rather obscure, for a spouse cannot, for purposes of succession, "represent" a deceased spouse. Possibly the descent of an entailed interest is indicated; as to this, see *post*, § 2058.

2054. No child of an intestate, whether total or “*Hotchpot*” partial, to whom a portion (either in real estate or personal estate) has been advanced by the intestate in his lifetime can claim anything under the intestacy without bringing such advancement into account for the benefit of the other children of the intestate, or their representatives ;^(a) and the same rule applies to the issue of such child claiming by representation the share of their deceased ancestor who has been so advanced.^(b) The rule has no application to relations other than issue.^(c)

(a) Administration of Estates Act, 1925, ss. 47 (1) (iii), 49.

For the meaning of “portion”, see *ante*, § 2013. The Act specifically includes any money or property which, by way of advancement or on the marriage of a child, has been paid to such child by the intestate or settled by him for the benefit of such child (including property covenanted to be paid or settled), unless there is evidence that the intestate desired it not to be taken into account (s. 47 (1) (iii)).

(b) Administration of Estates Act, 1925, s. 47 (1) (i) and (iii).

The Act does not provide that advances made *inter vivos* to the issue of such child shall be taken into account. But in cases of *partial* intestacy, the Act provides that any issue of the deceased must bring into account any benefits they have received under his will, in the absence of a contrary intention (s. 49).

(c) Administration of Estates Act, 1925, ss. 47 (3), 49.

2055. The provisions of § 2003 *ante*, apply to the case of a person entitled to claim any property under an intestacy. *Beneficiary must account*

Re Cordwell's Estate, White v. Cordwell (1875), L.R. 20 Eq. 644.

Re Knapman, Knapman v. Wreford (1881), 18 Ch. D. 300.

In intestacy, as under a will, the same principle applies although the debt may be statute-barred.

2056. If a tenant *pur autre vie* dies intestate in the lifetime of the *cestui que vie*, the estate goes to his representative. *Estate pur autre vie*

Section 45 (1) (a) of the Administration of Estates Act, 1925, has abolished devolution by special occupancy (see Challis, *Real Property*, 3rd ed., p. 358).

*Private
international
law*

2057. Descent of immovable property is determined exclusively by the *lex situs*; movable property is distributed ^(a) according to the law of the domicile of the testator at the time of his death.^(b)

- (a) But the application of the *lex domicilii* is confined to questions of distribution. Any right which is not a true right of succession, and which concerns movables in England, is governed by English Law (*Re Barnett's Trusts*, [1902] 1 Ch. 847).
- (b) So a change in the law of the deceased's domicile made subsequently to his death will not affect the rights of his successors (*Re Aganoor's Trusts* (1895), 64 L.J. (Ch.) 521).

Descent

2058. In three cases real property still descends according to the principles of the common law and the Inheritance Act, 1833, namely :

- (i) where the owner of an entailed interest dies without taking advantage of the statutory power (*ante*, § 1982) to devise it ;^(a)
- (ii) where a lunatic, unable, because of his condition, to make a will, dies intestate entitled to real property ;^(b)
- (iii) where property is granted or devised or bequeathed to an heir as *persona designata*.^(c)

(a) Administration of Estates Act, 1925, s. 45 (2).

The Legitimacy Act, 1926, s. 3 (i) (c) enables a legitimated person and his spouse, children, on more remote issue to take any interest by descent under an entailed interest created after the date of legitimation. But s. 9, which (*ante*, § 2047) enables a bastard to take property of his intestate mother, expressly disables him (subs. 3) from taking by descent or purchase any entailed interest in real or personal property.

(b) Administration of Estates Act, 1925, s. 51 (2).

(This is a transitional provision, as it applies only to lunatics alive and of full age at the commencement of the Act, and will, therefore, eventually become a dead letter.)

Re Harding, Westminster Bank, Ltd. v. Laver, [1934] Ch. 271.

It was held in *Re Berrey, Lewis v. Berrey*, [1936] Ch. 274, that this provision is not *pro tanto* repealed by the Legitimacy Act, 1926, s. 3 (1) ; and so a legitimated person cannot succeed a lunatic who comes within the provision of the Act of 1925. The decision is criticized in 52 *Law Quarterly Review*, 318.

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- (c) Administration of Estates Act, 1925, sect. 5 (1).
Law of Property Act, 1925, s. 132.

The Rule in *Shelley's Case*, *Wolfe v. Shelley* (1581), 1 Co. Rep. 93 b (see *ante*, § 1273) is abolished by the Law of Property Act, 1925, s. 131, which enacts, in effect, that where that rule would have applied, the heir now takes as purchaser, and is to be ascertained according to the general law of inheritance as it stood in 1925.

2059. The rules of inheritance of real property, which still obtain in the cases enumerated in § 2058, are as follows : *The old rules of inheritance to real property*

- (i) descent is traced in the first instance from the last purchaser, *i.e.* the person who last acquired the estate by conveyance or devise.^(a)
 - (ii) first come issue, the nearer degree excluding the remoter, except that the issue of any deceased person represent their ancestor *in infinitum*; but male issue exclude female issue in the same degree, and among males in the same degree, the elder excludes the younger. Females in the same degree inherit equally as coparceners.^(b)
- (a) Inheritance Act, 1833, s. 1. But if there is a total failure of the heirs of the purchaser, or if any real estate is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, descent is then traced from the person last entitled to the estate, as if he had been the purchaser. (Law of Property Amendment Act, 1859, s. 19.)
- (b) There is no statutory authority for these rules; but they have been accepted as law for at least three hundred years. In the descent of an estate in tail male (*ante*, § 1228) all females and their issue are excluded; and in the descent of an estate in tail female, all males and their issue are excluded.

2060. On failure of the issue of the purchaser, an interest in fee simple descends to the nearest lineal ancestor of the purchaser and his issue *in infinitum*, according to the rules laid down in § 2059, *ante*.^(a) *The same continued* But all paternal ancestors and their issue are preferred to all maternal ancestors and their issue;

and, among paternal and maternal ancestors respectively, all male ancestors and their issue are preferred to all female ancestors and their issue,^(b) while, among female ancestors, paternal or maternal, the mother of the more remote male ancestor, and her issue, are preferred to the mother of the less remote and her issue.^(c)

(a) Inheritance Act, 1833, s. 6.

(b) *Ibid.* s. 7.

(c) *Ibid.* s. 8.

An entailed interest is inheritable only by the heirs of the body of the original donee ; accordingly, his ancestors cannot inherit it.

*The same
continued*

2061. Collateral relatives of the half blood to the purchaser may inherit under § 2060 ; but they inherit only after relatives of the whole blood (male or female) in the same degree, and their issue.

Inheritance Act, 1833, s. 9.

The application of this rule leads to different results, according to whether the common ancestor is a male or a female. Where the common ancestor is a male, the whole blood collaterals of the same degree as the half blood take next after and as representing him, and the half blood collaterals rank next after them ; where the common ancestor is a female, the whole blood collaterals come before her, as representing their deceased male ancestor, and the half blood represent, and therefore take after, her (*ibid.*). This is the explanation of the rule (apparently arbitrary) stated in s. 9 of the Inheritance Act, that " the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother ".

TITLE III—SUCCESSION TO REAL ESTATE BETWEEN HUSBAND AND WIFE

2062. A man is entitled, on the death of his wife, *Curtsey* to a life interest in any real property to which his wife was solely and beneficially entitled at the time of her decease, for a present entailed interest which she has not devised (see *ante*, § 1982)^(a), or a fee simple which, being a lunatic, she could not devise (see *ante*, § 2058) ; provided that (i) issue capable of inheriting such interest ^(b) was born alive during the marriage, and (ii) the husband had, so far as possible,^(c) reduced the interest into possession before her death.

(a) Law of Property Act, 1925, s. 130 (4).

Administration of Estates Act, 1925, s. 51 (4).

(b) In the case of an interest in special tail, it is necessary, of course, that the issue should have been capable of taking under the entail.

(c) *Eager v. Furnivall* (1881), 17 Ch. D. 115.

The widow of a man who died intestate, prior to 1926, had likewise a right to a life interest in one third of his real property by way of dower, unless her right had been "barred". But this right now only survives in the case of a lunatic intestate husband who was living and of full age at the beginning of 1926 (see *ante*, § 2058), and, possibly, the widow of the owner of an entailed interest (Administration of Estates Act, 1925, s. 51 (2), (4)). In cases not falling within this paragraph, curtesy and dower are abolished by the Administration of Estates Act, 1925, s. 45 (1) (b), (c).

2063. A tenant by the curtesy has the statutory *Position of tenant by the curtesy* powers of a tenant for life under the Settled Land Act, 1925 (*ante*, Book III, Section VII).

Settled Land Act, 1925, s. 20 (1) (vii).

SECTION III

ADMINISTRATION OF ESTATES

TITLE I—THE PERSONAL REPRESENTATIVE

*Classes
of repre-
sentatives*

2064. A personal representative is either an executor, an administrator, or an executor *de son tort*.

Executor

2065. An executor is a personal representative appointed by testament to administer the estate of the testator in accordance with the lawful directions contained in the testament.

Farrington v. Knightly (1721), 1 P. Wms. at pp. 548-9.
Brownrigg v. Pike (1882), 7 P.D. at p. 64.

*Adminis-
trator*

2066. An administrator is a personal representative appointed by the Probate, Divorce, and Admiralty Division of the High Court,^(a) in the circumstances described in §§ 2080-2087, to distribute the estate of the deceased in accordance with the law,^(b) or with the terms of the deceased's testament, if any.^(c) Until an appointment is made, the property vests in the President of the Division.^(d)

(a) Judicature Act, 1925, ss. 150-167.

(b) Administration of Estates Act, 1925, ss. 45-47.

(c) An administrator *cum testamento annexo* (*post*, § 2085) and an administrator *de bonis non administratis* (*post*, § 2086) may have to follow the directions of a testament; and a similar rule may apply to other limited grants of administration.

(d) Administration of Estates Act, 1925, ss. 9, 55 (1) (xv).

*Executor
de son tort*

2067. An executor *de son tort* is a person who, without being either an executor or an administrator, takes upon himself to do acts in relation to the property of a deceased person which only an executor or administrator has authority to do.

Peters v. Leeder (1878), 47 L.J. (Q.B.) 573.

Wentworth, *Office of Executor* (14th edn.), p. 320.

2068. An executor is appointed either (i) expressly by the testator in his testament or by another person upon whom authority to do so has been conferred by the testament,^(a) or (ii) by implication, when on the construction of the testament it appears that a person has been given authority by the testator to pay debts or to perform other functions appropriate to the office of an executor^(b) ("executor according to the tenor").

Appointment of executor

(a) *In the Goods of Deichman* (1842), 3 Curt. 123.

Such a person may nominate himself (*In the Goods of Ryder* (1861), 2 Sw. & Tr. 127).

(b) *In the Goods of Punchard* (1872), L.R. 2 P. & D. 369.

In the Goods of Adamson (1875), L.R. 3 P. & D. 253.

In the Goods of Pryse, [1904] P. 301.

In the Estate of Mackenzie, [1909] P. 305.

In the Estate of Millar, *Irwin v. Caruth*, [1916] P. 23.

If there is any doubt as to the identity of the person appointed, the Court looks at the circumstances of the testator to decide (*Grant v. Grant* (1869), L.R. 2 P. & D. 8), but will not admit direct evidence of the testator's intention, except in a case of equivocation, i.e. where the description in the will is equally applicable to two or more persons (*In the Estate of Hubbuck*, [1905] P. 129). The same rule applies to the case of legatees (*Re Ofner*, *Samuel v. Ofner*, [1909] 1 Ch. 60), and of devisees (*Re Halston*, *Ewen v. Halston*, [1912] 1 Ch. 435). If the identity of the person appointed cannot be established, the appointment is void for uncertainty (*In the Goods of Blackwell* (1877), 2 P.D. 72). With regard to settled land, a testator is sometimes deemed to have appointed the settlement trustees as his special executors (Administration of Estates Act, 1925, s. 23 (1)). And in certain cases the Court has power to increase the number of executors (*ibid.* s. 23 (2); Judicature Act, 1925, s. 160 (2)).

2069. Any person may be appointed an executor. But if a lunatic (whether so found or not)^(a) is appointed sole executor, the Court will make a grant of administration during the lunacy^(b) to some other person. If a minor is appointed executor, the appointment is ineffective unless and until probate is granted

Capacity to act as executor

to him after he has come of age ; moreover, if he is appointed sole executor, administration will be granted to his guardian, or to such other person as the Court thinks fit, until the minor attains his majority.^(c) If a bankrupt is appointed sole executor, or a sole executor becomes bankrupt, the Court will appoint a receiver of the deceased's estate ;^(d) unless (*semble*) the testator knew of the bankruptcy when he made his testament.^(e) If a solvent executor, who is willing to act, is also appointed, the Court will restrain the bankrupt from acting,^(f) unless (*semble*) the testator was aware of the bankruptcy.^(g)

(a) *In the Goods of Crump* (1810), 3 Phillim. 497.

Ex parte Evelyn (1833), 2 My. & K. at p. 4.

(b) Judicature Act, 1925, s. 166.

In the Goods of Phillips (1824), 2 Add. 335.

(c) Judicature Act, 1925, s. 165.

By the Law of Property Act, 1925, s. 20, the appointment of a minor as *trustee* is simply void ; but this does not apply to executorships, as there is no provision in that Act similar to that of the Trustee Act, 1925, s. 69, which applies the provisions of the Act to executorships.

(d) *Re Hopkins, Dowd v. Hawtin* (1881), 19 Ch. D. 61.

(e) *Stainton v. Carron Co.* (1854), 18 Beav. at p. 161, *per* ROMILLY, M.R.

(f) *Bowen v. Phillips*, [1897] 1 Ch. 174.

(g) *Gladdon v. Stoneman* (1808), 1 Madd. 143, n.

S. 161 of the Judicature Act, 1925, empowers the Court to grant representation to a trust corporation (defined in s. 175 (1) of that Act, as amended by the Law of Property (Amendment) Act, 1926, s. 3), either solely or jointly with another person. An ordinary corporation, having its principal place of business in the United Kingdom, could obtain a grant of probate under s. 17 of the Administration of Justice Act, 1920. But this section is repealed by the Administration of Estates Act, 1925 ; and so it is probable that administration will now, as before 1920, be granted to a nominee of the corporation. But no probate or administration can be granted to a nominee of a trust corporation (Judicature Act, 1925, s. 161 (2) ; see also Williams, *Executors*, 12th edn. p. 133). A corporation sole (e.g. The Public Trustee) can take a direct grant (*In the Goods of Haynes* (1842) 3 Curt. 75 ; Public Trustee Act, 1906, ss. 1, 6 (1)).

property ; and, if there is a minority, or if a life interest arises under a will or intestacy, administration is granted to a trust corporation (*ante*, § 2069, n.), with or without an individual, or to not less than two individuals.^(a) If there is only one representative (other than a trust corporation), then, during the minority of a beneficiary or the subsistence of a life interest, or until the estate is fully administered, the Court may, on the application of the person interested, or of the guardian, committee, or receiver of any such person, appoint one or more representatives in addition to the original representative in accordance with Probate Rules and Orders.^(b)

(a) Judicature Act, 1925, s. 160 (1).

(b) *Ibid.* s. 160 (2).

2071. The appointment of an executor may be general, or it may be limited as to property,^(a) as to place,^(b) or as to duration ;^(c) or it may be made subject to a condition precedent,^(d) or determinable upon the happening of a condition subsequent.^(e)

*General
and special
executors*

(a) *Rose v. Bartlett* (1633), Cro. Car. 292, at p. 293.

In the Goods of Harris (1870), L.R. 2 P. & D. 83.

In the Estate of Millar, Irwin v. Caruth, [1916] P. 23.

Administration of Estates Act, 1925, s. 22 (*post*, § 2078).

(b) *Re Cohen's Executors and London County Council*, [1902] 1 Ch. at p. 188.

In the Estate of Millar, Irwin v. Caruth, ubi supra (executor according to the tenor).

(c) *Graysbrook v. Fox* (1564), 1 Plowd. at fo. 279, *per* WESTON, J. Swinburne, *Testaments*, Pt. IV, § 17. par. 1.

(d) *In the Goods of Langford* (1867), L.R. 1 P. & D. 458.

In the Goods of Foster (1871), L.R. 2 P. & D. 304.

(e) *Jennings v. Gower* (1591), Cro. Eliz. 219.

Bond v. Faikney (1757), 2 Lee, 371.

In the Goods of Lane (1864), 33 L.J. (P.M. & A.) 185.

2072. A person appointed executor may refuse the office ; even though he has promised the testator to accept it.^(a) If he will not decide whether to accept or refuse, he may be cited by creditors or legatees before the Court, and compelled to decide.^(b) If he does not

*Refusal
of office*

appear when cited, he will be treated as if he had refused.^(c)

(a) *Doyle v. Blake* (1804), 2 Sch. & Lef. at p. 239.

As to the method of refusal, see *post*, § 2075.

(b) Judicature Act, 1925, s. 159.

(c) Administration of Estates Act, 1925, s. 5.

Acceptance of office

2073. An executor accepts office either by taking out probate,^(a) or by “intermeddling”—i.e. doing acts which only an executor has authority to do.^(b) Neither an act of necessity,^(c) nor the collection of information as to the condition of the estate,^(d) constitutes acceptance of office.

(a) *Mohamidu Mohideen Hadjiar v. Pitchay*, [1894] A.C. 437.

A mere application for probate is not conclusive (*ibid.*).

(b) *Long and Feaver v. Symes and Hannam* (1832), 3 Hag. Ecc. 771 (advertising for creditors).

Vickers v. Bell (1864), 10 Jur. (N.S.) 376 (defending administration suit).

Re Stevens, Cooke v. Stevens, [1897] 1 Ch. 422 (payment of interest to creditor).

(c) *Long and Feaver v. Symes and Hannam*, *ubi supra*, per Sir JOHN NICHOLL.

(d) Godolphin, *Orphan's Legacy* (2nd edn.), p. 102.

An executor wishing to “take out probate” must (i) carry into the Probate Registry the original will and codicils (if any), along with a copy engrossed on specially prepared paper; (ii) take the executor’s “oath of office”, which verifies the will and the testator’s death, and undertakes duly to administer the estate; and (iii) make an affidavit containing particulars of the testator’s property for the purpose of enabling the Inland Revenue Commissioners to calculate the amount of the Death Duties payable. After the affidavit has been passed at the Estate Duty Office, a “grant” of probate under the seal of the Court is annexed to the engrossed copy of the will and codicils (if any); and the combined documents become, in effect, the official authority of the executor for performing the duties of his office. This is “probate in common form”, and is sufficient if everything is in order. But if the original will cannot be found, or there is a dispute as to the genuineness or validity of the will which is set up by the executor, it becomes necessary to “establish” the will by “probate in solemn form”, which involves the formal proof of the will before the Court and a jury (or the Court acting as a jury).

No renuncia- tion after acceptance

2074. An executor who has accepted office cannot

renounce probate,^(a) and can be compelled to take a grant.^(b)

(a) *In the Goods of Badenach* (1864), 3 Sw. & Tr. 465.

(b) *In the Goods of Davis* (1860), 4 Sw. & Tr. 213.

There is an old authority for saying that acceptance cannot be as to part of the estate ; unless the appointment is limited in accordance with § 2071 *ante* (*Paule v. Moodie* (1619), 2 Roll. Rep. 132). But see *post*, §§ 2075, 2078, as to settled land.

2075. An executor refuses office by filing a re- *Renunciation
of probate*
nunciation of probate (which need not be under seal)^(a) in the Court.^(b) A renunciation of probate completely severs the connection of the person renouncing with the estate ; and the representation of the testator devolves as if such person had never been appointed executor.^(c) The Court may, however, permit an executor who has renounced probate to withdraw his renunciation, but without prejudice to the acts of any other representative who has already proved the will or taken out letters of administration. In such a case a memorandum of the subsequent probate must be endorsed on the original probate or letters of administration.^(d)

(a) *In the Goods of Boyle* (1864), 3 Sw. & Tr. 426.

(b) *In the Goods of Morani* (1874), L.R. 3 P. & D. 151.

Until the renunciation is filed, it is not absolutely binding (*ibid.*). For an executor who will neither act nor renounce, see *ante*, § 2072. There is now an exception to the general rule that an executor cannot partially renounce : see Administration of Estates Act, 1925, s. 23 (settled land).

(c) Administration of Estates Act, 1925, s. 5.

(d) *Ibid.* s. 6.

2076. On the death of one of several executors *Devolution
of executor-
ship*
before the administration of the estate is complete, his office devolves on the survivor or survivors ;^(a) and, on the death of a sole or a last surviving executor who has proved the testament, his office devolves upon his executor.^(b) If such sole surviving executor

dies intestate, or without having appointed an executor, the Court makes a grant of administration *de bonis non administratis* of his testator.^(c)

(a) *Flanders v. Clarke* (1747), 3 Atk. at p. 510.

(b) Administration of Estates Act, 1925, s. 7 (1), (2).

(c) *Wankford v. Wankford* (1699-1704), 1 Salk. at p. 305. (If the sole or surviving executor has not proved the testament, a grant of administration *cum testamento annexo* is made (*ibid.*); for this and other cases in which such a grant is made see *post*, § 2085).

The above rules as to the "chain of representation" are now statutory (see Administration of Estates Act, 1925, s. 7). The general executor of an executor whose appointment is limited (*ante*, § 2071) represents the latter's testator (*In the Goods of Beer* (1851), 2 Rob. Eccl. 349); but the converse proposition does not hold (*In the Goods of Bridger* (1878), 4 P.D. 77). For the case of an executor who, after taking out probate, becomes incapable of acting, or disappears, see *post*, § 2086.

*Executor-
ship not
assignable*

2077. The office of executor or administrator is not assignable;^(a) but, with the sanction of the Court, it may be transferred to the Public Trustee.^(b)

(a) *Bedell v. Constable* (1668), Vaugh. at p. 182.

(b) Public Trustee Act, 1906, s. 6 (2).

*Special
executors as
respects
settled land*

2078. A testator in whom "settled land" (*ante*, § 1441) was vested prior to his death may appoint (and, in default of express appointment, will be deemed to have appointed) as his special executors in regard to (the) settled land, the persons, if any, who are, at the time of his death, trustees of the settlement.^(a) Such special executors may dispose of the settled land without the concurrence of the general personal representatives; and the latter may dispose of the other property and assets of the deceased without the consent of the former.^(b)

(a) Administration of Estates Act, 1925, s. 22. (For such persons, see *ante*, § 1485.)

(b) *Ibid.* s. 24.

The object of these two sections of the Act is, probably, to relieve the general executors of responsibility for the settled land. Separate grant of administration with the will annexed (*post*, § 2085) may be made to the special executors (Judicature Act, 1925, s. 162 (1)).

2079. If the settlement comes to an end on the death of the life tenant, the legal estate in the settled land vests in his personal representative. *Legal estate*

Re Bridgett and Hayes' Contract, [1928] Ch. 163.

In the Estate of Taylor, [1929] P. 260.

Here the deceased is not deemed to have appointed special executors for the purpose (cf. § 2078 *ante.*).

2080. When a person dies, leaving within the jurisdiction of the Court ^(a) property which devolves upon his personal representative, and leaving either no testament, or no operative testament, ^(b) the Court makes a general grant of administration. *Letters of administration*

(a) *In the Goods of Tucker* (1864), 3 Sw. & Tr. 585.

(b) *Re Ford, Ford v. Ford*, [1902] 2 Ch. 605.

Letters of administration (equivalent to the grant of probate to an executor) are obtained by application to the Probate Registry by the person deeming himself to be entitled. He must (i) make an affidavit which states the necessary facts, including the grounds of the applicant's claim; (ii) make the Inland Revenue affidavit (*ante*, § 2073, n.); (iii) enter into a bond with a surety or sureties for the due performance of his office (Judicature Act, 1925, s. 167); (iv) when the application is necessitated by the testator's failure to appoint an executor, or the death or refusal to act of the executors appointed, carry in the original will and codicils (if any), and an engrossed copy thereof (*post*, § 2085). The rules which will guide the Court in granting administration, general or special, are stated in §§ 2081–2084 *post*. A general grant of administration is also made when, an action having been begun to set aside an alleged testament, the defendant fails to appear (*In the Goods of Quick, Quick v. Quick*, [1899] P. 187), and when the executor of an alleged testament, being cited to produce it, fails to appear (*In the Goods of Dennis*, [1899] P. 191).

2081. In granting administration, the Court must have regard to the rights of all persons interested in the estate of the deceased or the proceeds of sale thereof under the statutory trusts for sale (*ante*, § 2035). *Rules governing grants of administration*

Thus, in the case of partial intestacy:—

- (i) the grant may be made to a devisee or legatee;

- (ii) in regard to land settled previously to the death of the deceased and not by his will, the grant may be made to the trustees of the settlement ;

Judicature Act, 1925, s. 162 (1).

The grant may be limited in any way the Court thinks fit.

in the case of total intestacy—

- (i) normally the grant must be made to one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose ;

Priority as between several claimants will normally be determined according to the order of succession (*ante*, §§ 2038–2063), and Williams, *Executors*, 12th edn., p. 307.

- (ii) as regards lands settled previously to the death of the deceased, the grant is made to the trustees, if any, of the settlement, if willing to act.

If, however, the estate is insolvent, or if special circumstances exist, the Court may, in its discretion, appoint as administrator such person as it thinks expedient, and may limit such appointment in any way it thinks fit.

Administration of Justice Act, 1928, s. 9.

Under this provision administration has been granted to the nominee of a person intending to prosecute a cause of action against the deceased's estate (*In the Estate of Simpson*, *In the Estate of Gunning*, [1936] P. 40).

*The Crown
as adminis-
trator*

2082. When the Crown is entitled to succeed to the property of an intestate who has left no next-of-kin and no spouse (*ante*, § 2048), the Crown is entitled to a grant of administration of the estate of the deceased.

Stote v. Tyndall (1757), 2 Lee, 394.

Under the Treasury Solicitor Act, 1876, s. 2, the Court may, if the Crown nominates the Treasury Solicitor for this purpose, make a

grant to him or his nominee. This Act speaks only of personal estate ; but its relevant provisions are extended by the Administration of Estates Act, 1925, ss. 30 (4), 57 (1), to include real estate. If the deceased was resident in the Duchy of Lancaster, the grant is made to the Solicitor to the Duchy (Treasury Solicitor Act, 1876, s. 9 (1), and if in Cornwall, to the nominee of the Duke of Cornwall (*In the Goods of Canning, Solicitor to Duchy of Cornwall v. Canning* (1880), 5 P.D. 114).

2083. The Public Trustee is entitled to a grant of administration equally with any other person or class of persons. But he will be postponed to the widower, widow, or next-of-kin of the deceased ; unless good cause is shown to the contrary.

The Public Trustee as administrator

Public Trustee Act, 1906, s. 6 (1).

Public Trustee Rules, 1912, R. 6 (1) (b).

This Act and the Rules are untouched by the Administration of Estates Act, 1925, and subsequent legislation on this subject ; but they are in harmony with them.

2084. In granting administration, the Court has a discretion, if it appears necessary or expedient, to pass over a person who would otherwise be entitled to a grant.

The Court's discretion in granting administration

Judicature Act, 1925, s. 162 (1) (b), as amended by Administration of Justice Act, 1928, s. 9.

This power formerly existed under section 73 of the Court of Probate Act, 1857, (repealed, for deaths after 1925, by Administration of Estates Act, 1925, s. 56). Thus, on the death intestate of a lunatic in circumstances in which his real estate devolves under the old law of inheritance (*ante*, § 2058) a grant of administration might be made to his common law heir. See also § 2081, *ante*.

2085. The Court will make a grant of administration *cum testamento annexo*, if a testator has not appointed an executor, expressly or by implication, by his testament ;^(a) or if an appointment of an executor fails to take effect by reason either of the death of the executor before the testator,^(b) or before the executor has proved the testament,^(c) or of his renunciation or failure to appear when cited to take probate.^(d)

Administration with will annexed

- (a) Judicature Act, 1925, s. 166.
Coke, 2 Inst. 397.
Graysbrook v. Fox (1564), 1 Plowd. at fo. 279.
- (b) *Pullen v. Serjeant* (1684), 2 Rep. Ch. 300.
In the Goods of McAuliffe, [1895] P. 290.
- (c) *Wankford v. Wankford* (1699-1704) 1 Salk. at p. 308.
- (d) *Garrard v. Garrard* (1871), L.R. 2 P. & D. 238.

If the will appointed several executors, the above is inapplicable unless the appointment fails as to all of them (*ante*, § 2076). The Court may authorize the withdrawal of a renunciation of probate (Administration of Estates Act, 1925, s. 6; *ante*, § 2075). And it may be necessary sometimes to make such a grant for a limited period, e.g. if the executor appointed by the testament is not to take office till after a stated time from the death (*Graysbrook v. Fox*, *ubi supra*, at fo. 279).

Supple-
mentary
grant

2086. On the death or disappearance of an administrator before the administration of the estate is complete, the Court appoints an administrator *de bonis non administratis* of his deceased.^(a) In making such a grant, the Court usually follows the same principles as it followed in making an original grant.^(b)

- (a) *In the Estate of Saker*, [1909] P. 233.
Bl. Comm. ii, 506.

See *ante*, § 2076, for other instances of such a grant.

- (b) *Walton v. Jacobson* (1765), 1 Hagg. Ecc. 346.

Capacity to
act as ad-
ministrator

2087. The provisions of § 2086 *ante* apply, *mutatis mutandis*, if the person *primâ facie* entitled to a grant of administration is a minor, or a lunatic.^(a) The Court does not ordinarily make a grant of administration to a bankrupt.^(b)

- (a) *Ex parte Evelyn* (1833), 2 My. & K. 3.

The grant is usually made to the lunatic's committee (*In the Goods of Phillips* (1824), 2 Add. 335, or to the minor's guardian.

- (b) *Coates' Case*, quoted in *Hill v. Mills* (1691), 1 Salk. 36.
In the Goods of Turner (1886), 12 P.D. 18 (see § 2084, *ante*).

Limited grants of administration are made *durante absentia* (Judicature Act, 1925, s. 164; *In the Goods of Suarez*, [1897] P. 82); *pendente lite* (Judicature Act, 1925, s. 163); *ad colligenda bona* (Judicature Act, 1925, s. 163; *Whitehead v. Palmer*, [1908] 1 K.B. 151); till a testament is brought to this country (*In the Goods of Metcalfe*

(1822), 1 Add. 343) ; or till a lost testament is produced (*In the Goods of Wright*, [1893] P. 21) ; limited to specific property, but only in exceptional cases (*In the Goods of Somerset (Lady)* (1867), L.R. 1 P. & D. 350 ; *In the Goods of Ratcliffe*, [1899] P. 110 ; see also Judicature Act, 1925, s. 155 (1)) ; or limited to specific acts (*In the Goods of Butler*, [1898] P. 9). In certain exceptional cases, defined by statute, no representation to the deceased is needed ; e.g. Army Pensions Act, 1830, s. 5 ; Loan Societies Act, 1840, s. 11 ; Army Prize (Shares of Deceased) Act, 1864, s. 3 ; Navy and Marines (Property of Deceased) Act, 1865, s. 6 ; Building Societies Act, 1874, s. 29 ; Provident Nominations and Small Intestates Act, 1883, s. 7 ; Superannuation Act, 1887, s. 8 ; Savings Bank Act, 1887, s. 3 (1) ; Industrial and Provident Societies Act, 1893, ss. 25, 26, 27 (1) ; Regimental Debts Act, 1893, ss. 7, 9, 16 ; Merchant Shipping Act, 1894, s. 176 ; Friendly Societies Act, 1896, ss. 56, 57 ; Government Annuities Act, 1929, ss. 21, 57 ; Superannuation (Various Services) Act, 1938, s. 2. See Tristram and Coote, *Probate Practice*, 19th ed., pp. 9-12.

2088. The Court may, on the application of an *Judicial trustee* executor or administrator, or of a beneficiary, in the exercise of its discretion, appoint a judicial trustee (*ante*, § 1742) of the deceased's estate, either jointly with any other person, or as sole trustee.

Judicial Trustees Act, 1896, s. 1 (2).

An executor or administrator may himself be appointed a judicial trustee (Judicial Trustee Rules, 1897, r. 25).

2089. If a person who is neither an executor nor *Executor de son tort* an administrator performs an act of administration,^(a) or otherwise intermeddles with the estate of a deceased person,^(b) he is an executor *de son tort* ; and a person who intermeddles with the assets under the direction of an executor *de son tort* is himself an executor *de son tort*.^(c) But if the intermeddling with the estate is of such a kind that it would be justifiable in a finder of goods, and there is no intention to assert any dominion over the property, it will not make the person intermeddling an executor *de son tort*.^(d) And a person who receives payment of a debt due to him,^(e) or property belonging to the de-

ceased,^(f) from an executor *de son tort*, is not himself, by virtue of such receipt, an executor *de son tort*.

(a) *New York Breweries Co. v. A.-G.*, [1899] A.C. 62.

(b) *Read's Case* (1604), 5 Co. Rep. 33 b.

Edwards v. Harben (1788), 2 Term Rep. at p. 597, *per* BULLER, J.

(c) *A.-G. v. New York Breweries Co.*, [1898] 1 Q.B. at p. 221, *per* RIGBY, L.J.

(d) *Sharland v. Mildon*, *Sharland v. Loosemore* (1846), 5 Hare, 469.

Peters v. Leeder (1878), 47 L.J. (Q.B.) 573, at p. 574, *per* LUSH, J.

(e) *Hursell v. Bird* (1891), 65 L.T. 709.

(f) *Paull v. Simpson* (1846), 9 Q.B. 365. (But he might be liable if he took trust property with notice of the trust (*Hill v. Curtis* (1865), L.R. 1 Eq. at p. 101).)

Whether or not a person has intermeddled is a question of fact for the jury; whether the intermeddling will make the intermeddler an executor *de son tort* is a question of law for the Court (*Padget v. Priest* (1787), 2 Term Rep. 97).

*Statutory
executor
de son tort*

2090. If a person, to the defrauding of creditors or without full valuable consideration, obtains any property of a deceased person, or effects the release of any debt or liability owing to the estate of the deceased, he will be charged as executor *de son tort* to the extent of the value of the property so acquired, or the debt or liability so released. But he may deduct all debts for valuable consideration and without fraud due to him from the deceased at the time of his death, and all payments made by him in a due course of administration.

Administration of Estates Act, 1925, s. 28.

*Liability
of executor
de son tort*

2091. An executor *de son tort* is under the same liabilities to the creditors^(a) and the beneficiaries^(b) of the estate as a rightful representative, to the extent of the property which has come to his hands;^(c) but, when sued by them, he can plead that he has fully administered,^(d) or that the claim is barred by the statutes of limitation,^(e) or that he has accounted to the rightful representatives before action brought,^(f) or that he has been acting for a person who has subsequently taken out administration.^(g)

- (a) *Rayner v. Koehler* (1872), L.R. 14 Eq. 262.
- Coote v. Whittington* (1873), L.R. 16 Eq. 534.
- (b) 1 Rolle, *Ab.* 919, Executors, F. pl. 1.
- (c) *Coote v. Whittington*, *ubi supra*, at p. 647.
- (d) *Oxenham v. Clapp* (1831), 2 B. & Ad. 309, at p. 314.

Semble : the executor *de son tort* is not liable for breaches of covenants contained in a lease vested in the deceased at the time of his death, even if he takes possession ; because the estate is not vested in him (*Stratford-upon-Avon Corporation v. Parker*, [1914] 2 K.B. 562).

- (e) *Webster v. Webster* (1804), 10 Ves. 93.
- (f) *Oxenham v. Clapp*, *ubi supra*, at pp. 314-5.
- Hill v. Curtis* (1865), L.R. 1 Eq. 90.
- (g) *Hill v. Curtis*, *ubi supra*, at p. 100.

2092. Acts done by an executor *de son tort* in a due course of administration are valid ;^(a) and creditors and beneficiaries of the deceased get a good title to property thus duly transferred to them.^(b) An executor *de son tort* is liable to the rightful representative for such acts ; but the damages recoverable against him will be nominal, unless the rightful representative has been thereby deprived of any of his privileges.^(c) If property is transferred or any other act done by an executor *de son tort*, otherwise than in a due course of administration, the creditors and beneficiaries in whose favour such acts are done, cannot take advantage of such acts ; and the rightful representative can recover the property or full damages therefor against them.^(d)

*Authority
of executor
de son tort*

- (a) *Coulter's Case* (1598), 5 Co. Rep. at fo. 30 b.
- Oxenham v. Clapp* (1831), 2 B. & Ad. at p. 314.
- (b) *Parker v. Kett* (1701), 1 Ld. Raym. at p. 661.
- Mouniford v. Gibson* (1804), 4 East at pp. 446-7.
- Thomson v. Harding* (1853), 2 E. & B. 630.
- (c) *Graysbrook v. Fox* (1564), 1 Plowd. at fo. 282.
- Padget v. Priest* (1787), 2 Term Rep. at p. 100.
- Thomson v. Harding*, *ubi supra*, at p. 639.
- Bl. Comm. ii, 508.
- (d) *Graysbrook v. Fox*, *ubi supra*.
- Padget v. Priest*, *ubi supra*, at p. 100.
- Mouniford v. Gibson*, *ubi supra*, at pp. 446-7.

*Enforce-
ment of
liabilities*

2093. The personal liability of an executor *de son tort*, who has wasted or converted to his own use the property of the deceased, can be enforced against his executors or administrators ;^(a) but his liability as representative of the deceased does not pass to them.^(b)

(a) Administration of Estates Act, 1925, s. 29.

(b) *Wilson v. Hodson* (1872), L.R. 7 Exch. 84.

*Cannot be
compelled
to administer*

2094. An executor *de son tort* cannot be compelled to take out letters of administration.

In the Goods of Davis (1860), 4 Sw. & Tr. 213.

TITLE II—THE TITLE AND INTEREST OF THE PERSONAL REPRESENTATIVE

2095. The title of an executor is derived from *Title of*
the testament ;^(a) and all property of the testator *executor*
which devolves upon him vests in him at the testator's
death.^(b) But the executor must obtain probate before
he can establish his title to the property, or his right
to perform the functions of an executor.^(c)

(a) *Comber's Case* (1721), 1 P. Wms. 766.

(b) *Woolley v. Clark* (1822), 5 B. & Ald. 744.

(c) *Smith v. Milles* (1786), 1 Term Rep. at p. 480.

Tarn v. Commercial Bank of Sydney (1884), 12 Q.B.D. 294.

Re Masonic and General Life Assurance Co. (1885), 32 Ch. D. 373.

See the judgments of Luxmoore, L.J., and Goddard, L.J., in
Ingall v. Moran, [1944] K.B. 160. The rule that the representative
can bring Trespass for wrongs to the deceased's chattels before probate
Oughton v. Seppings (1830), 1 B. & Ad. 241, at p. 244) but not
Grover (*Pinney v. Pinney* (1828), 8 B. & C. 335), illustrates this
principle. In the former case, the representative is in possession of
the deceased's property, and proof of his title is not necessary ; in the
latter case, proof of his title is (generally) necessary.

2096. The title of the administrator is derived ^(a) *Title of*
and (subject to § 2097) dates ^(b) from the grant of *adminis-*
administration. In the interval between the death *trator*
and the grant of administration, the property of the
deceased is vested in the President of the Probate,
Divorce, and Admiralty Division of the High Court.^(c)

(a) *Comber's Case* (1721), 1 P. Wms. 766.

(b) *Woolley v. Clark* (1822), 5 B. & Ald. 744.

Ingall v. Moran, [1944] K.B. 160.

(c) Administration of Estates Act, 1925, s. 9.

2097. When a grant of administration has been *Relation*
made, the title of the administrator relates back to *back*
the death for the following purposes—

(i) to enable the administrator to sue for wrongs

committed in respect of the property of the deceased between the death and the grant ;

Tharpe v. Stallwood (1843), 5 Man. & G. 760.

Foster v. Bates (1843), 12 M. & W. at p. 233, *per* PARKE, B.

In the Goods of Pryse, [1904] P. at p. 305.

- (ii) to validate dispositions of the deceased's property,^(a) or contracts affecting such property,^(b) made or entered into by the administrator during the same period, provided that they are for the benefit of the estate, and in a due course of administration ;^(c)

(a) *Morgan v. Thomas* (1853), 8 Exch. at p. 307, *per* PARKE, B.

(b) *Foster v. Bates*, *ubi supra*.

(c) *Whitehall v. Squire* (1703), 1 Salk. 295.

Morgan v. Thomas, *ubi supra*.

Foster v. Bates, *ubi supra*.

Re Watson, Ex parte Phillips (1886), 18 Q.B.D. 116.

- (iii) to enable the administrator to claim as adverse possessor under the Limitation Acts (*ante*, §§ 1405-1407).

Limitation Act, 1939, s. 15.

But the doctrine of relation back does not apply so as to expose the estate to liability for work done without the authority of the administrator ;^(a) nor (*semble*) to divest any rights belonging to third parties which have come into existence between the date of the death and the date of the grant.^(b)

(a) *Re Watson* (1887), 19 Q.B.D. 234.

But the administrator can ratify acts done without authority if they are for the benefit of the estate, and done in a due course of administration (*Foster v. Bates* (1843), 12 M. & W. 226) ; though not otherwise (*Re Watson* (1886), 18 Q.B.D. 116 ; *affirmed* (1887), 19 Q.B.D. 234).

(b) *Waring v. Dewberry* (1718), cited in argument in *R. v. Mann* (1727), Gilb. Ch. 223-4.

Thus, in *Ingall v. Moran*, [1944] K.B. 160, an administrator began an action but did not obtain letters of administration until two months later, by which time the cause of action had become statute-barred. The action failed ; the doctrine of relation back being inapplicable.

2098. Co-representatives are joint and several *Co-ownership of representatives*
 ers of such of the property of the deceased as
 s in them ;^(a) and, subject to § 2167 *post*, any
 of them can perform the functions of a sole
 representative in respect thereof.^(b)

1) *Owen v. Owen* (1738), 1 Atk. at p. 495.

2) *Cole v. Miles* (1852), 10 Hare, 179 (alienation of assets).

Charlton v. Durham (Earl) (1869), 4 Ch. App. 433 (giving receipts for debts due to the estate).

2099. The property of the deceased which vests *Fiduciary ownership of representative*
 he personal representative vests in him in right
 he deceased, and not in his own right ;^(a) and the
 erty thus vested in the representative is deemed to
 eparate from property which is vested in the repre-
 ative in his own right.^(b)

(a) *Pinchon's Case* (1611), 9 Co. Rep. 86 b, at fo. 88 b.

Farr v. Newman (1792), 4 Term Rep. 621.

(b) *Farr v. Newman*, *ubi supra*.

Re Radcliffe, Radcliffe v. Bewes, [1892] 1 Ch. 227.

(i) lapse of time, and enjoyment, with the con-
 sent of the beneficiaries, of the assets in a
 manner inconsistent with the terms of the
 testament, may raise an inference that the
 assets have become the property of the re-
 presentative in his own right ; *and*

Re Morgan, Pillgrem v. Pillgrem (1881), 18 Ch. D. 93, at p. 100, *per*
 Fry, J. (I.e. may be evidence of a gift from the beneficiaries.)

(ii) the creditors of the deceased may by their
 conduct preclude themselves from asserting,
 as against the creditors of the representative,
 that the property belongs to the representative
 in right of the deceased.

Ray v. Ray (1815), Coop. G. 264.

Fox v. Fisher (1819), 3 B. & Ald. 135.

Kitchen v. Ibbetson (1873), L.R. 17 Eq. 46.

For the powers of alienation vested in the representative, and
 conditions of their exercise, see *post*, § 2162.

*Revocation
of grant*

2100. The Court will revoke a grant of probate or letters of administration if the grant has been obtained by false or fraudulent allegations,^(a) or if a later testament is found,^(b) or if the personal representative becomes incapable of acting,^(c) or disappears.^(d)

(a) *Harrison v. Weldon* (1731), 2 Stra. 911.

In the Goods of Bergman (1842), 2 Notes of Cases, 22.

Birch v. Birch, [1902] P. 130.

(b) *Woolley v. Clark* (1822), 5 B. & Ald. 744.

(c) *Offley v. Best* (1666), 1 Sid. 370, at pp. 372-3.

(d) *In the Goods of Covell* (1889), 15 P.D. 8.

In the Goods of Loveday, [1900] P. 154.

For a detailed account of the various other grounds on which the Court will revoke a grant, see Williams, *Executors* (12th ed.), pp. 394-401. Presumably, when a grant has been revoked, and there is no executor entitled, a grant *de bonis non administratis* (*ante*, § 2086) is made to a new administrator (*Garner v. Dee* (1671), Freem. (K.B.) 13; *Warren v. Kelson* (1859), 1 Sw. & Tr. 290).

*Validity
of acts before
revocation*

2101. Notwithstanding the revocation of a grant of probate or administration—

- (i) acts previously done by the representative in due course of administration of the estate are not thereby rendered invalid ;

Administration of Estates Act, 1925, s. 27 (2), making statutory the principle of *Boxall v. Boxall* (1884), 27 Ch. D. 220, and *Hewson v. Shelley*, [1914] 2 Ch. 13.

- (ii) payments previously made to the representative under such grant in good faith, discharge the payers ;

Administration of Estates Act, 1925, s. 27 (1).

- (iii) the representative is entitled to be reimbursed in respect of payments made by him in a due course of administration ;

Ibid. s. 27 (2).

- (iv) persons who have made any payment or transfer to him upon the faith of such probate or administration will not be thereby prejudiced.

Ibid.

TITLE III—RIGHTS AND LIABILITIES PASSING TO THE PERSONAL REPRESENTATIVE

2102. The personal representative takes in the first instance all the property to which the deceased was entitled, unless the deceased's interest in it ceased at his death (see *ante*, § 1982). This includes property over which the deceased had a general power of appointment, which he has exercised by his will.

*Property
passing to
representa-
tive*

Administration of Estates Act, 1925, ss. 1-3.

An entailed interest to which the deceased was entitled at his death, but which he has not disposed of by his testament, and the interest of a corporator sole (*ante*, § 18) in the property of the corporation, are deemed to cease at his death (*ibid.* s. 3 (3) (5)).

2103. Subject to any agreement between the partners, the amount due from surviving partners to the personal representatives of a deceased partner in respect of the deceased partner's share in the partnership property, is a debt accruing at the date of his death;^(a) and the representative of the deceased partner has a general lien upon the surplus assets of the partnership for the amount due.^(b)

*Claim to
share of
partnership
property*

(a) Partnership Act, 1890, s. 43.

(b) *Re Bourne, Bourne v. Bourne*, [1906] 2 Ch. at p. 432, *per* ROMER, L.J.

Such a lien is, as the Court pointed out, only in the nature of an equitable charge, which does not prevent dealing with the assets by the surviving partners, at any rate in favour of *bona fide* purchasers, but merely entitles the lienor to a sale by the Court. It bears little, if any, resemblance to a common law lien on goods (*ante*, § 1525).

2104. Whether the property to which the deceased was entitled at his death passes to his personal representative as real or personal estate, is decided by the application of the equitable doctrine of Conversion to the dispositions contained in the deceased's testa-

Conversion

ment, or the instrument under which he acquired the property.

Owing to the radical changes in the law of intestate succession and administration of assets made by the Administration of Estates Act, 1925, the doctrine of Conversion has been deprived of much of its importance. But it would appear to be still significant for devises and bequests, and for settlements *inter vivos*. *Seemle*, in the case of a complete intestacy, the doctrine has no application.

*Trust for
sale*

2105. A notional conversion from one character to the other is effected (i) by a trust for sale, or (ii) by a direction to invest in real estate directly the instrument creating the trust comes into effect ; but not by a mere power of sale or investment, until the power is exercised.

Re Adams and Kensington Vestry (1884), 27 Ch. D. 394.

In the former instance, the real estate is treated as personal ; in the latter, personal estate is treated as real estate.

*Partnership
real estate*

2106. In the absence of agreement to the contrary between the partners, real estate which passes to the personal representative of a deceased partner as part of his share in the partnership assets, passes as personal estate.

Partnership Act, 1890, s. 22.

A.-G. v. Hubbuck (1884), 13 Q.B.D. at pp. 289, 290, *per* BOWEN, L.J.

Partners are usually made joint tenants of real estate acquired for partnership purposes ; and, on the death of one of them, his legal interest therein passes, therefore, to the survivors and not to his representative.

*Options to
purchase*

2107. When the owner of real estate has conferred upon another person a binding option to purchase such real estate, the property will, for the purposes of succession, be deemed to be personal estate as from the time when such person has bound himself to exercise the option, but not before.^(a) Subject to this paragraph, it makes no difference that the option is not exercised until after the death of the owner of the real estate.^(b)

- (a) *Lawes v. Bennett* (1785), 1 Cox, Eq. Cas. 167.
City of London Improvement Act, Ex parte Hardy, (1861), 30 Beav.
 206.
Re Isaacs, Isaacs v. Reginall, [1894] 3 Ch. 506.

Consequently, there can be claim to back rents by the taker of the personal estate under the settlement or devise (*Townley v. Bedwell* (1808), 14 Ves. 591).

- (b) *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724.

Presumably, the converse rule would apply in the conceivable but unlikely case of the owner of personalty creating an option to exchange it for real estate. In *Re Carrington, Ralphs v. Swithenbank*, [1932] 1 Ch. 1, the doctrine of *Lawes v. Bennett* was extended by being applied so as to take the proceeds of certain shares, over which an option to purchase was given subsequently to the making of the will, out of the hands of the specific legatees and to throw it into residue.

2108. The doctrine of Conversion may be prevented from operating by any expression of intention either by the settlor,^(a) or by any person who becomes absolutely entitled to the property in question under the provisions of the settlement or testamentary disposition.^(b) “Reconversion”

- (a) *Phillips v. Phillips* (1832), 1 My. & K. 649.
Fitch v. Weber (1848), 6 Hare, 145.
Re Pyle, Pyle v. Pyle, [1895] 1 Ch. 724.
 (b) *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305.
Re Grimthorpe (Lord), Beckett v. Grimthorpe (Lord), [1908] 2 Ch. 675.
O’Grady v. Wilmot, [1916] 2 A.C. 231.
Re Sturt, De Bunsen v. Hardinge, [1922] 1 Ch. 416.

2109. In so far as rights arising out of contract and tort survive the contracting or injured party, they pass to, and can be enforced by, his personal representative. *Survival of choses in action*

Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.

2110. If a representative, as such, enters into contracts,^(a) or if torts are committed against the property of the deceased, after the latter’s death,^(b) and the benefit of such contracts, or the damages recoverable for such torts, would, when recovered, be assets of *Representative may sue in either capacity*

the deceased, the representative may sue upon such contracts or torts either in his representative or in his personal capacity, as he may think best.

(a) *Moseley v. Rendell* (1871), L.R. 6 Q.B. 338.

Abbott v. Parfitt (1871), L.R. 6 Q.B. 346.

(b) *Adams v. Cheverel* (1606), Cro. Jac. 113.

Hollis v. Smith (1808), 10 East, 293.

The same principle applies to the recovery of assets of the deceased paid away by mistake (*Clark v. Hougham* (1823), 2 B. & C. 149).

*Survival
of liabilities*

2111. In so far as liabilities in contract and tort survive the contractor or tortfeasor, they pass to and can be enforced against his personal representative.^(a) In respect of covenants the burden of which runs with the land at law, the devisee is also liable to the extent of assets received by him;^(b) in respect of covenants whereof the burden runs in equity, devisees are liable in manner and to the extent specified in §§ 1343–1347 *ante*.

(a) Law Reform (Miscellaneous Provisions) Act, 1934, ss. 1, 3.

(b) Administration of Estates Act, 1925, s. 32.

Law of Property Act, 1925, s. 80 (2).

*Liabilities
of lessor's
representative*

2112. The personal representative of a lessor is liable to the lessee, to the extent of assets, for all breaches of covenants in the lease committed by the lessor in his lifetime, including covenants which run with the reversion.^(a) But if the lessor's real estate has been devised, liability for the breach of the obligations of the lessor incident to the relation of landlord and tenant falls, as amongst the persons entitled to his estate, primarily upon the devisee.^(b)

(a) *Eccles v. Mills*, [1898] A.C. at p. 371.

(b) *Mansel v. Norton* (1883), 22 Ch. D. 769.

Eccles v. Mills, *ubi supra*, at pp. 371–2.

The question whether the devisee is primarily liable for breaches which occurred during the lessor's lifetime (contrast § 2148, *post*), is a question whether the liability operates as a charge upon the reversion (see *Eccles v. Mills*, *supra*, at pp. 371–2; Administration of Estates Act, 1925, ss. 34 (3), 35; *post*, §§ 2146, 2149).

2113. The personal representative of a lessee, whether or not such representative has entered upon the land demised, is liable to the lessor, to the extent of the assets of the deceased, for breaches of the stipulations contained in the lease, occurring either before or after the lessee's death ; and, subject to § 2115 *post*, he remains liable, although the premises have been assigned by the lessee ^(a) or by himself.^(b) But the personal representative of an assignee of a lease does not remain liable for breaches occurring after a *bonâ fide* assignment by the deceased or himself ;^(c) and, if the stipulations in the lease are onerous, it may be his duty to assign it.^(d)

(a) *Brett v. Cumberland* (1619), Cro. Jac. 521.

(b) *Coghil v. Freelove* (1690), 3 Mod. Rep. 325.

(c) *Pitcher v. Tovey* (1692), 4 Mod. Rep. 71.

(d) *Onslow v. Corrie* (1817), 2 Madd. 330.

These rules are merely the consequences of the general principles as to liability on leases set out in Book III, § 1080 *ante*.

2114. The personal representative of a lessee, if he has entered on the land demised, becomes liable personally to the lessor, irrespective of assets, for the future rent and for future breaches of the stipulations in the lease, until he assigns the lease.^(a) If the estate is insolvent, his liability in respect of rent is limited to the yearly value of the premises ;^(b) but his liability for the breach of a covenant to repair is unlimited.^(c)

(a) *Wollaston v. Hakewill* (1841), 3 Man. & G. at p. 320, *per* TINDAL, C.J.

It is for this reason that the personal representative can, before distributing the assets, claim to have a sum of money set apart to indemnify him against future liabilities which he may personally have incurred by taking possession, as an assign of the lessee (*Re Nixon, Gray v. Bell*, [1904] 1 Ch. 638 ; *Re Owers, Public Trustee v. Death*, [1941] Ch. 389 ; but cf. *Re Lewis, Jennings v. Hemsley*, [1939] Ch. 232). The representative of an assignee naturally gets rid of all liability for future breaches by assigning the lease (§ 2113 *ante*).

- (b) *Re Bowes, Strathmore (Earl) v. Vane, Norcliffe's Claim* (1887), 37 Ch. D. 128.
Whitehead v. Palmer, [1908] 1 K.B. 151.
 (c) *Tremere v. Morison* (1834), 1 Bing. (N.C.) 89.
Rendall v. Andreae (1892), 61 L.J. (Q.B.) 630. (There appears to be no authority as to covenants other than covenants to repair.)

*Statutory
 notices*

2115. If a representative, liable as such^(a) for the rents or covenants contained in a lease, or in any grant made in consideration of a rent charge, or any indemnity in respect of such rents or covenants, has satisfied all accrued liabilities in these respects, and has, where necessary, set apart a sum sufficient to answer future liabilities in respect of any fixed sum agreed by the lessee or grantee to be laid out upon the property demised or conveyed, though the period for laying out the same has not arrived, he may convey the property demised or granted to any person entitled to call for a conveyance, and thereafter distribute the rest of the residuary estate, real and personal, without appropriating any further part of it to meet any future liability under the lease or grant. He will then be under no further liability in respect of the lease or grant. But the lessor or grantor may, in case further liabilities arise, follow the assets into the hands of those to whom they have been distributed.^(b)

(a) *Re Owers, Public Trustee v. Death*, [1941] Ch. at p. 391 (*aliter* if he is personally liable as in § 2114 *ante*).

(b) Trustee Act, 1925, s. 26. (The word "lease" includes an underlease and an agreement for a lease or underlease and any instrument for giving any indemnity in respect of rents or covenants or varying the liabilities in a lease.)

The right of the creditor to follow the assets after distribution is, however, purely equitable, and can only be exercised on equitable principles. Thus, if the creditor has induced the beneficiaries to believe that they might safely take the assets, his remedy against them will be gone (*Blake v. Gale* (1886), 32 Ch. D. 571); and, if he might have proved his debt in the ordinary way before distribution, he will only be allowed to enforce his claim *pro rata* (*Gillespie v. Alexander* (1827), 3 Russ. 130). But, if he was unable to prove, he may sue any beneficiary, and leave adjustment to him (*Davies v. Nicolson*

(1858), 2 De G. & J. 693) ; and mere delay, if satisfactorily explained, is no bar to his action (*Re Eustace, Lee v. McMillan*, [1912] 1 Ch. 561). A transferee in good faith from a beneficiary is protected (Administration of Estates Act, 1925, s. 32 (2)).

2116. The personal representative of a deceased shareholder is liable, to the extent of assets, to satisfy all obligations connected with the holding.^(a) If the shares are transferred into his name on the register of shareholders of the company, he becomes a member of the company, and can be made personally liable, irrespective of assets, for calls subsequently becoming due thereon.^(b) The personal representative can transfer the shares of the deceased without being registered as a shareholder.^(c)

Liability of representative on shares

(a) *Re Agricultural Cattle Insurance Co., Baird's Case* (1870), 5 Ch. App. at p. 735.

(b) *Re City of Glasgow Bank, Buchan's Case* (1879), 4 App. Cas. 549.

(c) Companies Act, 1929, s. 64.

2117. The personal representative of a deceased partner is liable, to the extent of the deceased's assets, after the deceased's separate debts have been paid, for the debts of the firm contracted while the deceased was a partner.

Liability of representative for partnership debts

Partnership Act, 1890, s. 9.

Re Hodgson, Beckett v. Ramsdale (1885), 31 Ch. D. 177.

A limited partner's estate cannot be made liable for more than the capital contributed by him (Limited Partnership Act, 1907, s. 4 (2)).

2118. If a personal representative incurs new liabilities in the execution of his office, he is personally liable to the creditors thereon, irrespective of assets. But if such liabilities were incurred by him in due course of administration, he may be sued in his representative capacity.

New liabilities incurred by representative

Ashby v. Ashby (1827), 7 B. & C. 444.

Re Evans, Evans v. Evans (1887), 34 Ch. D. 597 (continuing deceased's business).

For the representative's right of indemnity, see *post*, § 2175.

TITLE IV—ADMINISTRATION OF ASSETS

Definition of assets

2119. Assets comprise all property passing on the death of a person to his personal representative, which is in his hands liable for payment of the deceased's debts, or the claims of the legatees, devisees or next of kin of the deceased, in manner hereinafter described.

Donationes mortis causa (*ante*, §§ 2027–2034.) do not ordinarily pass to the personal representative on the death, but they may be assets for the payment of debts (§ 2033).

Limitation of liability of repre- sentative

2120. The liability of the personal representative, as such, to pay the debts or legacies of the deceased is *primâ facie* limited to the amount of the assets which he has received or which but for his wilful default (*post*, § 2182) he might have received.^(a) And a plea that he has fully administered the assets is (subject to §§ 2114–2116 *ante*), if proved, a defence to any claim by a creditor or a legatee.^(b)

(a) *Bl. Comm.* II, 510.

(b) *Erving v. Peters* (1790), 3 Term Rep. at p. 688, *per* Lord KENYON, C.J.

All property of deceased now assets

2121. The whole estate of a deceased person, real and personal, legal and equitable, which passes to his personal representative^(a) (see *ante*, § 2102), to the extent of the beneficial interest of the deceased therein, and the estate of which a deceased person in pursuance of any general power (including the power to dispose of entailed interests),^(b) disposes by his will, are assets for the payment of his debts. Any disposition by will inconsistent with this rule is void as against his creditors.^(c) The creditors can assert their claims in respect thereof either by a personal action against the representative, or by an action for the administration of the estate.

- (a) Including realty which still devolves according to the Inheritance Act, 1833 (see *ante*, § 2058), (*Re Gates, Gates v. Gates*, [1930] 1 Ch. 199).
- (b) Law of Property Act, 1925, s. 176 (see *ante*, § 1982).
- (c) Administration of Estates Act, 1925, s. 32 (1).

2122. An estate is said to be insolvent when it is insufficient to pay all the administration expenses and debts of the deceased. It is said to be solvent when it is sufficient to pay all the debts, though it may not be sufficient to pay all the legacies in full.

Solvent and insolvent estates

Re Leng, Tarn v. Emmerson, [1895] 1 Ch. at p. 658.

2123. A solvent estate may be administered either by the representative out of Court, or by the Chancery Division of the High Court. An insolvent estate may be administered in either of these two ways, or by the Chancery Division sitting in Bankruptcy.

Method of administration

The procedure of administration in bankruptcy is prescribed by Bankruptcy Act, 1914, s. 130 (which was repealed by the Administration of Estates Act, 1925, but kept alive by the Expiring Laws Act, 1925), and is inapplicable until there is a personal representative (*Re Debtor*, (1,035 of 1938) [1939] Ch. 594).

2124. If the estate is insolvent, then, in whichever of the three methods described in § 2123 the administration is taking place, the debts must be paid in the order prescribed in §§ 2125–2128 *post*, which cannot be altered by anything contained in the will of the deceased.

Order in which debts to be paid

Administration of Estates Act, 1925, s. 34 (1).

2125. Funeral, testamentary, and administration expenses have priority; and, subject thereto, the respective rights of secured and unsecured creditors and the priorities of debts generally are to be adjusted according to the current law of bankruptcy.

General statement of the law governing priority of debts

Administration of Estates Act, 1925, s. 34 (1), and First Schedule, Part I.

Bankruptcy Act, 1914, s. 130 (6).

*Current law
of bank-
ruptcy*

2126. The current law of bankruptcy is that all debts shall be paid *pari passu*, except that certain debts are preferred and certain others deferred.

Bankruptcy Act, 1914, s. 33.

*Debts pre-
ferred by
special
statutes*

2127. Next to funeral, testamentary, and administration expenses come debts to which priority has been given by certain statutes, e.g. : Trustee Savings Banks Act, 1863, s. 14 ; Savings Banks Act, 1891, s. 13 ; Regimental Debts Act, 1893, s. 2 ; Friendly Societies Act, 1896, s. 35.

Semble : These debts rank *inter se* rateably ; but the statutes are silent on the point.

*Debts pre-
ferred by
the Bank-
ruptcy Act,
1914*

Next come debts preferred by the Bankruptcy Act, 1914, ss. 33, 34, viz. :

- (a) parochial and other local rates due at the time of death, and having become due and payable within twelve months next before that time, and all taxes up to one year's assessment ;

If the deceased is in arrear for more than one year, the Crown is not bound to choose the last year as the basis of claim, but may choose the year of the highest assessment (*A.-G. v. Jackson*, [1932] A.C. 365).

- (b) servants' wages for the last four months, up to £50 ;
- (c) labourers' wages for the last two months, up to £25 ;
- (d) amounts due in respect of compensation under the Workmen's Compensation Act, 1925, the liability wherefor accrued before the death ;

This Act has been repealed except as regards rights to compensation which arise before the appointed day under the National Insurance (Industrial Injuries) Act, 1946 : *ibid.* s. 89.

- (e) contributions payable by the deceased during

the twelve months before his death, as an employer, under the National Insurance (Industrial Injuries) Act, 1946; or, as an employer or self-employed or non-employed person, under the National Insurance Act, 1946.

These debts rank *inter se* rateably, under Bankruptcy Act, 1914, s. 33 (2).

2128. The following debts are postponed to all others :— *Deferred debts*

- (a) money lent by one of two spouses to the other for the purposes of trade ;

Bankruptcy Act, 1914, s. 36.

- (b) money lent or due on the sale of goodwill, in consideration of a share in the profits of a business.

Partnership Act, 1890, s. 3.

2129. A secured creditor can elect either to give up his security and sue for his whole debt, or realize his security and prove for the deficiency. *Secured and unsecured debts*

Bankruptcy Act, 1914, s. 7 (2) and 2nd Sched.

Couldery v. Bartrum (1881), 19 Ch. D. 394, at pp. 400-1.

2130. The existence of future and contingent liabilities does not prevent creditors whose debts are presently due enforcing their claims.^(a) But, if such liabilities exist and become debts, the personal representative will render himself personally liable to pay them, if, knowing of their existence,^(b) he distributes the assets to the beneficiaries without making provision for them ;^(c) unless he distributes them under an administration order of the Court.^(d) *Future and contingent liabilities*

- (a) *Read v. Blunt* (1832), 5 Sim. 567.

Re Hargreaves, Dicks v. Hare (1890), 44 Ch. D. 236.

- (b) *Re Fludyer, Wingfield v. Erskine*, [1898] 2 Ch. 562.

- (c) *Taylor v. Taylor* (1870), L.R. 10 Eq. 477. (As to his rights against the beneficiaries in such a case see § 2145 *post*, and Title III, § 2115, n., *ante*.)
- (d) *Re King, Mellor v. South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72.

If the representative is unaware of the existence of such liabilities, he will be protected by notice issued under § 2145 *post*.

*Preference
by repre-
sentative*

2131. A personal representative, other than a creditor administrator,^(a) can, as between creditors of equal degree, pay one in preference to another, out of all the assets, even though he knows that the other has begun an action for the enforcement of his debt.^(b) But, after an order has been made for the administration of the estate by the Court,^(c) or the appointment of a receiver,^(d) this right cannot be exercised by the representative.

- (a) See note (a) to § 2132 *post*.
- (b) *Vibart v. Coles* (1890), 24 Q.B.D. 364.
Administration of Estates Act, 1925, s. 34 (2).
- (c) *Davies v. Parry*, [1899] 1 Ch. at p. 609. (The right is not lost by an order against the representative for an account (*Re Barrett, Whitaker v. Barrett* (1889), 43 Ch. D. 70).)
- (d) *Re Radcliffe, European Assurance Society v. Radcliffe* (1878), 7 Ch. D. at p. 734.

*Retainer
by repre-
sentative*

2132. A personal representative, other than a creditor administrator,^(a) or an executor *de son tort*,^(b) can, as against creditors of equal degree, but not as against creditors of a higher degree,^(c) retain, out of all the assets actually or constructively in his possession,^(d) a debt due to himself (whether solely or jointly with another person)^(e) from the deceased.^(f) But he only has this right when the debt is due to him in his own right and not as a trustee for another person.^(g)

- (a) The present practice, as a result of *In the Estate of Leguia, deceased* (1936), 155 L.T. 270, is, in a grant under s. 162 of the Judicature Act, 1925 (as amended by the Administration of Justice Act, 1928, s. 9), always to describe a creditor as such, so that his oath will take the usual form, which prevents retainer and preference by him.
- (b) *Coulter's Case* (1598), 5 Co. Rep. 30 a.
Oxenham v. Clapp (1831), 2 B. & Ad. at pp. 313-5.

As to the deductions which can be made by the executor *de son tort*, under the Administration of Estates Act, 1925, s. 28, see *ante*, § 2090. This provision reproduces, with amendments, 43 Eliz. (1601) c. 8; its wording now seems wide enough to give him a right of retainer (cf. Williams, *Executors*, 12th. ed., p. 658).

(c) Administration of Estates Act, 1925, s. 34 (2).

A.-G. v. Jackson, [1932] A.C. 365.

Re S.P., *Ex parte Official Receiver*, [1936] Ch. 735.

But a representative who has, in good faith and without undue haste, distributed the assets and retained his own debt at a time when he had no notice of the existence of a debt of higher degree, will not be compelled to refund when that debt comes to light (see § 2120 *ante*; *Re Fludyer*, [1898] 2 Ch. 562).

(d) *Pulman v. Meadows*, [1901] 1 Ch. 233.

Re Beavan, Davies, Banks & Co. v. Beavan, [1913] 2 Ch. 595.

If the debt to the representative exceeds the amount of the assets, he can retain the assets in specie (*Re Gilbert, Ex parte Gilbert*, [1898] 1 Q.B. 282).

(e) *Re Fennes, Oetzel v. Fennes* (1909), 53 Sol. Jo. 376.

Administration of Estates Act, 1925, s. 34 (2).

(f) *Re Compton, Norton v. Compton* (1885), 30 Ch. D. at p. 19, *per* COTTON, L.J.

(g) Administration of Estates Act, s. 34 (2).

Re Rudd, Royal Exchange Assurance v. Ballantine, [1942] Ch. 421.

2133. The right of retainer can be exercised even after an order for the administration of the estate has been made,^(a) and out of (i) money paid into court, if the personal representative could have insisted upon the payment being made to himself,^(b) and (ii) money paid by the personal representative to a receiver,^(c) or, if the estate is being administered in bankruptcy, to the Official Receiver.^(d) It cannot be exercised out of money collected by a receiver^(e) or the Official Receiver,^(f) or out of money collected by the personal representative after he knows that an application for an order to administer the estate in bankruptcy has been made.^(g)

Retainer not stopped by administration order

(a) *Ex parte Campbell, Campbell v. Campbell* (1880), 16 Ch. D. 198.

(b) *Richmond v. White* (1879), 12 Ch. D. 361.

(c) *Re Harrison, Latimer v. Harrison* (1886), 32 Ch. D. 395.

(d) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. 347.

- (e) *Re Harrison, Latimer v. Harrison, ubi supra.*
- (f) *Re Rhoades, Ex parte Rhoades, ubi supra.*
- (g) *Ibid.* at p. 352.

In *Richmond v. White, supra*, the right was held to have priority over the costs of an administration ; but query whether these are not of higher degree.

*Debts
which can
be retained*

2134. The right of retainer can be exercised in respect both of legal and of equitable debts,^(a) and also in respect of claims for unliquidated damages^(b) and other unascertained sums of money,^(c) provided that they are ascertainable by a fixed standard. No right of retainer can be asserted in respect of sums not thus ascertainable,^(d) nor in respect of equitable claims not in the nature of debts,^(e) nor in respect of debts assigned by another creditor to the representative after he became such.^(f)

- (a) *Re Giles, Jones v. Pennfather*, [1896] 1 Ch. 956, as modified by *Re Beavan, Davies, Banks & Co. v. Beavan*, [1913] 2 Ch. at pp. 600, 602.
- (b) *Re Compton, Norton v. Compton* (1885), 30 Ch. D. 15.
- (c) *Re Morris's Estate, Morris v. Morris* (1874), 10 Ch. App. 68.
- (d) *Loane v. Casey* (1775); 2 Wm. Bl. 965.
- (e) *Re Sutherland (Dowager Duchess), Michell v. Bubna (Countess)*, [1914] 2 Ch. 720.
- (f) *Jones v. Evans* (1876), 2 Ch. D. 420.

Presumably this last rule would not apply to debts assigned to the personal representative before the death of the testator or intestate.

*Retainer by
co-repre-
sentatives*

2135. A retainer by one of several co-representatives can only be exercised subject to the rights of his co-representatives ; and the proceeds must be applied rateably amongst those entitled to retain.

Chapman v. Turner (1739), 9 Mod. Rep. 268.

A representative appointed during the minority or lunacy of a person entitled to the grant can retain for his own debt (*Briers v. Goddard* (1617), Hob. 250), and *semble* for that of the minor or lunatic (*Franks v. Cooper* (1799), 4 Ves. 763).

*Retainer
after repre-
sentative's
death*

2136. If a personal representative dies without having exercised his right of retainer, that right is not

exercisable by his personal representative, even though it was claimed during the deceased personal representative's lifetime ; unless the latter's representative is also a personal representative of the original testator.

Re Compton, Norton v. Compton (1885), 30 Ch. D. 15.

2137. A personal representative can by his conduct waive his right of retainer ;^(a) and if a creditor of the deceased obtains a judgment against such representative in an action in which the right was not asserted, the representative cannot afterwards set up the right of retainer against the judgment.^(b) He does not lose it merely by failure to assert it, if the occasion to assert it has not arisen.^(c)

*Waiver of
right to
retain*

(a) *Player v. Foxhall* (1826), 1 Russ. 538.

(b) *Re Marvin, Crawter v. Marvin*, [1905] 2 Ch. 490.

(c) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. at p. 353.

2138. A personal representative may pay, or retain in respect of, a debt as to which the statutes of limitation might be pleaded.^(a) But he may not pay (*semble*), or retain in respect of, a debt which is unenforceable by reason of non-compliance with the Statute of Frauds ;^(b) and he may not pay a debt after it has been declared by the Court to be a statute-barred.^(c)

*Payment
of statute-
barred debt*

(a) *Stahlschmidt v. Lett* (1853), 1 Sm. & G. 415.

(b) *Re Rowson, Field v. White* (1885), 29 Ch. D. 358 (promise made in consideration of marriage) ; but cf. Trustee Act, 1925, s. 15 (c), *post* § 2170.

(c) *Re Midgley, Midgley v. Midgley*, [1893] 3 Ch. 282.

After an order for the administration of the estate, the defence of the statutes of limitation may be set up by any creditor or legatee (*Shewen v. Vanderhorst* (1831), 1 Russ. & M. 347) ; but not as against a creditor who is a plaintiff in the administration action (*Briggs v. Wilson* (1854), 5 De G.M. & G. 12 ; *Fuller v. Redman* (No. 2) (1859), 26 Beav. 614).

2139. If, in an action against co-representatives, one pleads the statutes of limitation, and the other

*Plea of
statute by*

one of co-
representa-
tives

or others do not, the Court accepts the plea ;^(a) but (possibly) one representative can (subject to § 2138 *ante*) pay a statute-barred debt against the wish of the others.^(b)

(a) *Re Midgley, Midgley v. Midgley*, [1893] 3 Ch. at p. 302, *per* LOPES, L.J.

(b) *Ibid.* at p. 297, *per* LINDLEY, L.J.
Astbury v. Astbury, [1898] 2 Ch. at p. 115, *per* STIRLING, J.

Keeping
alive of
claim

2140. One of several co-representatives can prevent the statutes of limitation running in respect of any claim to the personal estate of the deceased, or to any share or interest therein, by a written acknowledgment signed by the person making it or by a payment in respect of any such claim.

Limitation Act, 1939, ss. 23 (4), 24, 25 (7).

This provision concerns the liability of the deceased's estate, not any personal liability of the representatives. *Quaere* whether it is wide enough to cover debts due from the estate, as under the previous law (see *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181. "Personal estate" does not include chattels real (s. 31 (1)), but presumably includes any beneficial interest under an intestacy (Administration of Estates Act, 1925, s. 33 (1)). Ordinarily, under the Act of 1939 (see s. 25 (5), (6)), whereas such an acknowledgment of a debt binds no one but the acknowledgor and his successors, a payment by him (except in respect of a debt which is already statute-barred) binds "all persons liable in respect thereof." For the rules before the Act, see 3rd edition, § 2173. The period of limitation for a claim by a beneficiary under a will or intestacy is now ordinarily twelve years (Act of 1939, ss. 5 (2), 19 (1), 20).

Acknowledg-
ment or pay-
ment by
representa-
tive

2141. If a personal representative (by himself or his agent) acknowledges in writing signed by him a debt owed by the deceased, or any claim to the personal estate of the deceased, or makes a payment in respect thereof, the right of action therefor is deemed to accrue afresh on the date of such acknowledgment or payment.

Limitation Act, 1939, ss. 23 (4), 24 (1).

Thereupon any applicable period of limitation (see *post*, § 2142) commences to run afresh as against the representation and (*semble*)

against the deceased's estate (s. 25 (7) ; also *ante*, § 2140). The Act refers to acknowledgments or payments made by "the person liable or accountable" (s. 23 (4)), and so appears to include those made by a personal representative as such. Formerly, the operation of such payments or acknowledgments upon claims against the deceased's estate depended upon whether the estate was realty or personalty (see 3rd edition, §§ 2173-2175).

2142. If a testator effectively creates a trust for the payment of his creditors, it would seem that no period of limitation prevents the enforcement of the trust against the trust property or its proceeds whilst in the hands of the trustee.^(a) But no such trust arises, *semble*, from a general direction in the testament, requiring the representatives to pay all debts out of the personal estate, since that was their regular duty at common law.^(b) Since the Limitation Act, 1939, it seems probable that a provision in the testament, charging the testator's debts upon some of the assets, does not now operate to enlarge the period of limitation in respect of simple contract debts.^(c)

Effect of trust or charge for payment of debts

(a) Limitation Act, 1939, s. 19 (1).

In such a case, however, the equitable doctrines of laches and acquiescence may apply (*ibid.*, s. 29). As to actions founded upon a *devastavit*, see *post*, § 2183.

(b) *Scott v. Jones* (1838), 4 Cl. & Fin. 382.

Re Stephens, Warburton v. Stephens (1889), 43 Ch. D. 39.

Trusts to pay debts out of realty did not become nugatory after the Land Transfer Act, 1897 (*Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791) ; nor, *semble*, after the Administration of Estates Act, 1925 ; since they may operate to charge the realty, and so alter the period of limitation (see, now, Act of 1939, s. 18 (1)) or exonerate the personalty (*Re Kempster, Kempster v. Kempster*, [1906] 1 Ch. 446). *Quære* whether similar arguments are not now equally available in favour of trusts to pay debts out of the personalty.

(c) Limitation Act, 1939, ss. 2, 18 (1).

The normal period of six years becomes twelve if the debt is "secured" by a mortgage or charge (*ibid.*) ; but a clause in the will purporting to charge the testator's debts upon some part of his estate is usually inserted for the purpose of exonerating other assets, not in order to "secure" the debts. If such a charge operates as a legacy

to the creditor, however, the period would become twelve years by virtue of section 20 of the Act. For the previous law, whereby a charge of debts upon testator's realty enlarged the period, see 3rd edition, § 2175.

*Running of
statutes of
limitation*

2143. Against a creditor who had a complete cause of action before the decease of his debtor, the statutory period of limitation continues to run notwithstanding the decease.^(a) Against a creditor whose cause of action is not complete till after his debtor's decease, the statutory period does not begin to run until the executor accepts office,^(b) or, if there is no executor who accepts office, until a grant of administration is made.^(c)

(a) *Boatwright v. Boatwright* (1873), L.R. 17 Eq. 71.

(b) *Douglas v. Forrest* (1828), 4 Bing. 686, at p. 704.

(c) *Burdick v. Garrick* (1870), 5 Ch. App. at p. 241.

Atkinson v. Bradford Third Equitable Benefit Building Society (1890), 25 Q.B.D. 377.

The latter rule applies if the completion of the cause of action and the death occur on the same day; unless there is evidence that the cause of action accrued before the death (*Atkinson v. Bradford Third Equitable Benefit Building Society*, *ubi supra*, at pp. 381-2). The Limitation Act, 1939, appears not to have affected these decisions.

*When the
Court may
conduct the
administra-
tion*

2144. The Chancery Division may administer the estate of a deceased person as an insolvent estate, whenever there is good reason to suppose that such estate is not sufficient to pay the debts of the deceased,^(a) together with the costs of administration.^(b) And if there is any doubt as to whether or not the estate is solvent, the Court may direct an enquiry to ascertain the facts.^(c)

(a) *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. at p. 377.

(b) *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652.

(c) *Re Smith, Green v. Smith* (1883), 22 Ch. D. at p. 592.

*Distribution
by repre-
sentative*

2145. If a personal representative has issued advertisements inviting creditors and others to send in their claims against the estate, similar to those issued

by the Court in an action for administration, he may at the expiration of the time fixed by the advertisements for sending in claims,^(a) distribute the assets amongst the persons entitled thereto, without incurring any liability to creditors of whose claims he had no notice at the time of the distribution.^(b) But unpaid creditors and claimants may follow the assets into the hands of the persons who have received them.^(c)

(a) This must not be less than two months (see *Re Leatherbrow*, [1935] W.N. 34).

(b) It is immaterial that the creditor has not sent in his claim, if in fact the representative was aware of it (*Re Land Credit Co. of Ireland, Markwell's Case* (1872), 21 W.R. 135).

(c) Trustee Act, 1925, s. 27.

As to the rules to be observed in following the assets, see *ante*, § 2115.

2146. If the estate is solvent, the order in which the assets are applicable for the payment of debts, and funeral, testamentary and administration expenses, is as follows :—

*Order of
resort to
assets for
payment of
debts*

- (i) property of the deceased undisposed of by the testament, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies ;

A lapsed share of residue is "undisposed of" for this purpose (*Re Lamb, Vipond v. Lamb*, [1929] 1 Ch. 722). "Pecuniary legacy" is defined in Administration of Estates Act, 1925, s. 55 (1) (ix), as including "an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect".

- (ii) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet

any pecuniary legacies, so far as not provided for as aforesaid ;

It has been held that this fund for the pecuniary legacies must ordinarily be taken, as far as possible, from the residuary personalty only (*Re Thompson, Public Trustee v. Husband*, [1936] Ch. 676 ; *Re Rowe, Bennetts v. Eddy*, [1941] Ch. 343 ; *Re Anstead, Gurney v. Anstead*, [1943] Ch. at p. 164) ; see § 2152, *post*.

- (iii) property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts ;

As the whole order can be altered by the will of the deceased, it is difficult to see why these assets are placed only third in order.

- (iv) property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to charge for the payment of debts ;
- (v) the fund, if any, retained to meet pecuniary legacies ;
- (vi) property specifically devised or bequeathed, rateably according to value ;
- (vii) property appointed by testament (i.e. of the deceased) under a general power (including the statutory power to dispose of entailed interests), rateably according to value.

Administration of Estates Act, 1925, s. 34 (3) and First Schedule, Part II.

If the estate is insolvent, it is immaterial to the beneficiaries in what order the assets are resorted to, as, *ex hypothesi*, they will get nothing in any case.

*Power of
deceased to
alter by will*

2147. The order of payment of debts in an insolvent estate can under no circumstances be altered by the testament of the deceased (see *ante*, § 2124). But his testament can freely alter the order of application of assets for the payment of debts.

Administration of Estates Act 1925, s. 34 (3), First Schedule, Part II, s. 8 (a).

Re Atkinson, Webster v. Walter, [1930] 1 Ch. 47 (residuary personality in priority to undisposed-of realty).

Re Littlewood, Clark v. Littlewood, [1931] 1 Ch. 443 (property specifically bequeathed in priority to residue).

Re Petty, Holliday v. Petty, [1929] 1 Ch. 726 (lapsed share of residue liable together with, and not in priority to, the other shares, as was the position before 1926 (*Trethewy v. Helyar* (1876), 4 Ch. D. 53)).

Re Kempthorne, Charles v. Kempthorne, [1930] 1 Ch. 268.

Re Harland-Peck, Hercy v. Mayclothing, [1941] Ch. 182.

2148. Liabilities incident to any particular asset which fall due after the owner's decease,^(a) and charges upon any particular asset neither created^(b) nor adopted as his own^(c) by the deceased, are, as between the different persons claiming through the deceased, borne by the beneficiary entitled to that asset. Liabilities arising under a contract made by the deceased, though for the benefit of any particular asset, are (subject to §§ 2149, 2150, *post*) primarily borne by the deceased's general estate.^(d)

*Liabilities
incident to
property*

(a) *Fitz Williams v. Kelly* (1852), 10 Hare, 266 (fines due on a lease).

Addams v. Ferick (1859), 26 Beav. 384 (calls on shares).

Re Betty, Betty v. A.-G., [1899] 1 Ch. 821 (obligations under a lease).

(b) *Swainson v. Swainson* (1856), 6 De G.M. & G. 648.

(c) *Townshend v. Mosyn* (1858), 26 Beav. 72.

It is on this principle that the cost of upkeep of a specific legacy after the testator's death falls on the specific legatee (*Re Pearce*, [1909] 1 Ch. 819; *ante*, § 1995).

(d) *Cooper v. Jarman* (1866), L.R. 3 Eq. 98.

Re Day, Sprake v. Day, [1898] 2 Ch. 510.

On similar principles, if the deceased borrowed money on the security of property and then assigned the property to another, his general estate is liable after his death to indemnify the assignee against the mortgage debt, unless the assignment was made subject to the mortgage (*Re Best, Parker v. Best*, [1924] 1 Ch. 42; *Re Mainwaring, Mainwaring v. Verden*, [1937] Ch. 96).

2149. The liability to satisfy any mortgage, lien, or charge created by a deceased person upon any part of his property is, as between the devisee or legatee of such property, and his other devisees, legatees, or successors on intestacy, borne primarily by

*Mortgages
and charges
on property*

the devisee or legatee taking the property so charged, unless a contrary intention has been declared by the deceased in his testament, deed, or other document.^(a) But the person taking the property subject to such mortgage, lien, or charge, does not become personally liable to discharge the liability.^(b)

(a) Administration of Estates Act, 1925, s. 35 (1).

(b) *Syer v. Gladstone* (1885), 30 Ch. D. 614.

“Contrary
intention”

2150. A general direction given by a testator that his debts shall be paid out of his personal estate, or his residuary real or personal estate or residuary real estate, is not a declaration of a contrary intention within the meaning of § 2149 *ante*. In order that § 2149 may be excluded, it must appear that the deceased has either expressly, or by necessary implication, referred to the debts secured by mortgage, lien, or charge, and directed them to be discharged out of his residuary estate.

Administration of Estates Act, 1925, s. 35 (2).

Re Valpy, Valpy v. Valpy, [1906] 1 Ch. 531.

Re Fegan, Fegan v. Fegan, [1928] Ch. 45.

The right of a pecuniary legatee to payment of his legacy was, in equity, before the passing of the Real Estate Charges Acts (which are replaced by the Administration of Estates Act, s. 35), prior to the right of a devisee of mortgaged land to have the mortgage debt paid out of the personalty; and this rule still holds good (*Re Fry, Fry v. Fry*, [1912] 2 Ch. 86). Therefore, a “contrary intention” signified by the testament may leave the pecuniary legatee with this priority (*Re Smith, Smith v. Smith*, [1899] 1 Ch. at pp. 371–3).

Order of
resort to
assets for
payment of
pecuniary
legacies

2151. *Mutatis mutandis*, assets are applicable for the payment of pecuniary legacies in the same order in which they are applicable for the payment of debts, subject, as in the case of debts, to variation by the testament.

Re Emerson, Morrill v. Nutty, [1929] 1 Ch. 128, 132, *per* TOMLIN, J.

Re Worthington, Nichols v. Hari, [1933] Ch. 771.

Accordingly, a “pecuniary legacy” (including an annuity or a general legacy, see Administration of Estates Act, 1925, s. 55 (1)

(ix)) is ordinarily payable primarily out of any property undisposed of by the will remaining after payment of debts ; failing which property comprised in a residuary gift would be used (*ibid.*, First Sch. Pt. II, 1, 2) ; but not, *semble*, any of the other assets listed in § 2146, *ante*, unless the testament so directs. Among assets of the same degree, personalty may be primarily liable (to the exoneration of the realty) to bear pecuniary legacies (*Re Thompson, Public Trustee v. Husband*, [1936] Ch. 676 ; § 2146 (ii) *ante*) ; but *quaere* whether this extends to debts.

2152. If the residue remaining for payment of *Mixed fund* pecuniary legacies consists of a mixed fund of realty and personalty, the personalty must be exhausted before resort is made to the realty.

Re Boardt, Knight v. Knight, [1895] 1 Ch. 499.

Re Thompson, Public Trustee v. Husband, [1936] Ch. 676.

If the testament has treated the residuary realty and personalty separately, and not as a mixed fund, and has shown no intention to charge the real estate with the payment of pecuniary legacies, it may be that there is no power to resort to the realty (see *Re Rowe, Bennetts v. Eddy*, [1941] Ch. at p. 346).

2153. The rules contained in § 2146 *ante*, do *Liability for death duties* not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

Administration of Estates Act, 1925, Schedule I, Part II, s. 8 (b).

Re Thompson, Public Trustee v. Husband, [1936] Ch. at pp. 682-3.

Re Anstead, Gurney v. Anstead, [1943] Ch. 161.

2154. If, by the action of a creditor, the order of resort to the assets of a deceased person for payment of debts (*ante*, § 2146) has been disturbed, a beneficiary who has suffered by such disturbance can claim to stand in the place of the creditor, and to obtain satisfaction from the fund primarily liable for the debt, to the extent to which the fund out of which the beneficiary has a *primâ facie* claim to satisfaction has been depleted ("marshalling"). *"Marshalling"*

Recourse to this doctrine is much less common now than before 1926. (For the cases in which it then had to be applied see the 2nd

edn. of this work, § 2193.) But that recourse to it may still be necessary is shown by the fact that the doctrine is expressly preserved by Administration of Estates Act, 1925, s. 2 (3). If, e.g., the representative has used assets for the payment of debts in an order other than that prescribed by Schedule I, Part II of the Administration of Estates Act, 1925, the property must be marshalled in order that the burden may be borne by the assets primarily liable.

TITLE V—DUTIES AND POWERS OF THE PERSONAL REPRESENTATIVE

2155. An executor has the custody of the body *Burial of deceased* of the deceased until its burial or cremation,^(a) and is not obliged to obey the directions given by the deceased as to its disposal.^(b) He must bury or cremate it ^(c) in a manner suitable to the amount of the deceased's assets and station in life.^(d) The purchase of mourning garments for the use of the deceased's relatives is not a part of the funeral expenses which the executor may incur.^(e)

(a) *Williams v. Williams* (1882), 20 Ch. D. at p. 664, *per* KAY, J.

As to cremation see *R. v. Price* (1884), 12 Q.B.D. 247, and the Cremation Act, 1902.

(b) *Williams v. Williams*, *ubi supra*, at p. 665.

(c) *Sharp v. Lush* (1879), 10 Ch. D. at p. 472.

(d) *Hancock v. Podmore* (1830), 1 B. & Ad. 260.

Edwards v. Edwards (1834), 2 Cr. & M. 612.

(e) *Johnson v. Baker* (1825), 2 C. & P. 207.

Bridge v. Brown (1843), 2 Y. & C. Ch. Cas. 181.

Semble : as between the personal representative and the beneficiaries, a direction in the testament to furnish mourning garments would be treated as a legacy.

2156. The personal representative must make and *Inventory of estate* produce an inventory of the deceased's estate, if required to do so by the Court.

Administration of Estates Act, 1925, s. 25.

In practice, the representative never exhibits the inventory unless he is called upon to do so (*Myddleton v. Rushout* (1797), 1 Phillim. 244 ; *Phillips v. Bignell* (1811), 1 Phillim. at p. 240). The place of the inventory is taken by the accounts rendered by the personal representative to the Inland Revenue authorities for the purpose of assessing the Death Duties.

2157. The personal representative must collect *Realization of assets* and realize the estate of the deceased within a time

which is, in the circumstances of the estate, reasonable.^(a) He must call in unsecured debts due to the estate ;^(b) but he need not call in a debt secured upon apparently adequate real security.^(c) He is not liable for failure to secure payment, if he has done all he could to obtain it.^(d)

(a) *Grayburn v. Clarkson* (1868), 3 Ch. App. at p. 606.

Prima facie, a year is a reasonable time ; and if the representative takes longer, the onus is on him to justify the delay (*ibid.*). The Administration of Estates Act, 1925, s. 44, provides that he is not bound to distribute the estate before the expiration of one year from the death.

(b) *Powell v. Evans* (1801), 5 Ves. at p. 844.

(c) *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. at p. 778 (see also Trustee Act, 1925, ss. 4, 68 (17)).

(d) *Glack v. Holland* (1854), 19 Beav. at pp. 271-2.

Even if he takes no steps to enforce payment, the representative may escape liability, if he can show that he had reasonable grounds for belief that such steps would have been ineffectual (*ibid.*). But in such a case the onus of proof is on him (*Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. at p. 568).

*No duty
to invest*

2158. In the absence of directions to the contrary in the testament, the personal representative is not obliged to invest the deceased's money ;^(a) but, if he leaves it at a bank, he must keep it on a separate account.^(b)

(a) *Johnson v. Newton* (1853), 11 Hare, 160.

(b) *Wilks v. Groom* (1856), 25 L.J. (Ch.) at p. 729.

This is an important point in which a personal representative differs from a trustee (*ante*, §§ 1748-1758). The purpose of the former is to distribute the estate, of the latter to preserve it.

*Application
of Trustee
Act*

2159. The provisions of the Trustee Act, 1925, applicable to trustees are, except where otherwise (therein) expressly provided, applicable also to executors and administrators created either before or after the commencement of that Act.

Trustee Act, 1925, s. 69.

Douse v. Gorton, [1891] A.C. at p. 204, *per* Lord MACNAGHTEN.

For particulars of these provisions, see *ante*, Book III, Section

XVII (*passim*). In the Act, the word "trustee" includes a personal representative where the context admits (s. 68 (17)), and the word "trust" extends to the duties of a personal representative (*ibid.*).

2160. If any of the property of the deceased cannot be at once realized, the personal representative has the powers of management necessary to maintain its value. *Management of property*

Strickland v. Symons (1883), 22 Ch. D. at p. 671.

Administration of Estates Act, 1925, s. 39 (1) (i).

He has also the powers of management conferred upon trustees by the Trustee Act, 1925 (see § 2159, *ante*), and further powers for the purposes of administration (see § 2165, *post.*). The illustration given in the case quoted is that of a ship which is allowed by the representative to complete her voyage, or upon which money is expended to enable her to earn freight. Another illustration of the principle is that described in the next paragraph.

2161. The personal representative may carry on a business belonging to the deceased with a view to winding it up ^(a) or of selling it as a going concern.^(b) If authorized by the testator, he may (as between himself and the beneficiaries) carry it on for an indefinite period;^(c) but none of the assets may be invested in it without the testator's authority,^(d) and, if such authority is given, the amount invested must not exceed that authorized.^(e) *Carrying on deceased's business*

(a) *Collinson v. Lister* (1855), 20 Beav. 356.

(b) *Dowse v. Gorton*, [1891] A.C. at p. 199, *per* Lord HERSCHELL.
O'Neill v. McGrorty, [1915] 1 I. R. at p. 17, *per* O'CONNOR, M.R.

(c) *Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42.
Re Crowther, Midgeley v. Crowther, [1895] 2 Ch. 56.
Re Oxley, Hornby (John) & Sons v. Oxley, [1914] 1 Ch. 613.

In *Collinson v. Lister*, *ubi supra*, it is laid down that the business can only be carried on for the purpose of winding up. But in *Dowse v. Gorton*, *ubi supra*, at p. 199, Lord HERSCHELL says that it can also be carried on (even as against the creditors), with a view to its sale as a going concern. In such a case, however, the business can only be carried on for a time which is in the circumstances reasonable (*Re Smith, Arnold v. Smith*, [1896] 1 Ch. 171.)

(d) *Re Hodson, Ex parte Richardson* (1818), 3 Madd. 138.
Cutbush v. Cutbush (1839), 1 Beav. 184.

M'Neillie v. Acton (1853), 4 De G.M. & G. 744.

(e) *Re Ballman, Ex parte Garland* (1804), 10 Ves. at p. 120.

Of course in any case the representative is bound to complete pending contracts entered into by the deceased (*Marshall v. Broadhurst* (1831), 1 Cr. & J. 403). For the effect of carrying on a business upon the rights of beneficiaries and creditors, see *post*, §§ 2176-2178.

*Powers of
disposition*

2162. The personal representative has, for the purpose of duly administering the assets, the power to sell, mortgage, or pledge the real and personal estate vested in him;^(a) and neither creditor,^(b) beneficiary,^(c) nor co-representative^(d) can, *primâ facie*, impeach the title of the purchaser, mortgagee, or pledgee from or of the representative.

(a) Administration of Estates Act, 1925, ss. 1 (3), 2, 39 (1) (i).

Nugent v. Gifford (1738), 1 Atk. 463.

Mead v. Orrery (Lord) (1745), 3 Atk. at p. 337.

Scott v. Tyler (1788), 2 Dick, at p. 725.

Re Norwood's and Blake's Contract, [1917] 1 I. R. 472.

(b) *Nugent v. Gifford, ubi supra*.

Mead v. Orrery (Lord), ubi supra.

Whale v. Booth (1784), 4 Term Rep. 625, n., *per* Lord MANSFIELD, C.J.

(c) *Ewer v. Corbet* (1723), 2 P. Wms. 148.

Mead v. Orrery (Lord), ubi supra.

(d) *M'Leod v. Drummond* (1807), 14 Ves. 353; *on appeal* (1810), 17 Ves. 152.

Attenborough v. Solomon, [1913] A.C. at p. 83, *per* Lord HALDANE, C.

As regards real estate (including leaseholds), however, a valid conveyance cannot now be made without the concurrence of all the representatives (Administration of Estates Act, 1925, s. 2 (2)).

But the sale, mortgage, or pledge can be set aside if :—

- (i) the person seeking to set it aside can prove that the purchaser, mortgagee, or pledgee knew that it was made fraudulently, or otherwise than in a due course of administration^(a) or that it was made without valuable consideration, or for an illusory consideration;^(b) *or*,

(a) *Scott v. Tyler, ubi supra* at p. 724.

M'Leod v. Drummond (1810), 17 Ves. at p. 170, *per* Lord ELDON, C.

(b) *Scott v. Tyler*, *ubi supra* at pp. 725-6, *per* Lord THURLOW, C.
Rice v. Gordon (1848), 11 Beav. 265, 270.

It is on this principle that a sale or pledge of the assets by the representative to satisfy his private debt is invalid when the facts are known to the purchaser or pledgee (*Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. at p. 98, *per* FRY, J.).

- (ii) the representative creates a merely equitable charge upon the deceased's property for his own purposes, even in favour of a person who had no notice that he was dealing with a representative.

Re Morgan, Pillgrem v. Pillgrem (1881), 18 Ch. D. 93.

Purchasers and others acquiring title from personal representatives are now protected by statute in certain cases : see § 2163 *post*, also Trustee Act, 1925, ss. 14, 17.

2163. An assent in writing by a personal representative operates like a conveyance, to vest in the person entitled any estate or interest in real estate ^(a) which the testator or intestate was entitled. An assent not in writing or not in favour of a named person is ineffectual to pass a legal estate.^(b) The person in whose favour an assent has been given may require notice of the assent to be endorsed on the probate or letters of administration.^(c) A purchaser from a representative is protected against all but a person who has taken this precaution by obtaining a statement in writing from the representative that he has not given an assent with regard to the property purchased.^(d) An assent or conveyance by a representative is, in favour of a purchaser from a beneficiary, sufficient evidence (unless the purchaser has notice to the contrary) that the beneficiary in whose favour it is given is the person entitled to have the legal estate conveyed to him ; unless notice of a previous assent is endorsed on the probate or letters of administration.^(e) A conveyance of a legal estate is not invalidated by reason only that the purchaser may

*Effect of
 assent or
 conveyance
 by personal
 representative*

have notice that all the debts and legacies have been discharged or provided for.^(f)

- (a) This includes leaseholds (Administration of Estates Act, 1925, s. 55 (1) (xix). As regards pure personalty, a purchaser or pledgee is still running risks in dealing with a representative, for he may find he is holding property in respect of which an implied assent has been given, or part of the residue after the passing of the residuary account (*Attenborough v. Solomon*, [1913] A.C. 76).
- (b) Administration of Estates Act, 1925, s. 36 (1), (4).
- (c) *Ibid.* s. 36 (5), *Re Miller's and Pickersgill's Contract*, [1931] 1 Ch. 511.
- (d) *Ibid.* s. 36 (6). This gets rid of the difficulty raised by *Wise v. Whitburn*, [1924] 1 Ch. 460.
- (e) Administration of Estates Act, 1925, s. 36 (7), as construed in *Re Duce and Boots Cash Chemists (Southern), Ltd.'s Contract*, [1937] Ch. 642.
- (f) *Ibid.* s. 36 (8). For the purposes of this paragraph, "purchaser" means a lessee, mortgagee or other person who in good faith acquires a legal estate in land for money or money's worth (*Ibid.* ss. 36 (11), 55 (1) (xviii)).

*Powers to
lease, etc.*

2164. For giving effect to beneficial interests the representative may limit or demise land for a term of years absolute, with or without impeachment of waste, to trustees on the usual trusts for raising or securing any principal sum and the interest thereon for which the land or any part thereof is liable, and may limit or grant a rent charge for giving effect to any annual or periodical sum for which the land or the income thereof or any part thereof is liable.

Administration of Estates Act, 1925, s. 40.

*Powers of
management*

2165. In addition to the powers described in § 2164 *ante*, the personal representative has, for purposes of administration, or during the minority of any beneficiary or the subsistence of any life interest, the following powers :—

- (i) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and

powers as if the same affected the proceeds of sale) ;

- (ii) all the powers conferred by statute on trustees for sale (*ante*, §§ 1762-1767), so that every contract entered into by the representative shall be binding on and shall be enforceable against and by the representative for the time being, and may be carried into effect, or be varied or rescinded by him, and in the case of a contract entered into by a predecessor, as if it had been entered into by himself.

Administration of Estates Act, 1925, s. 39 (1) (ii), (iii).

Furthermore, s. 39 (1) (i) of the Act preserves for these purposes, and extends to real property, all the powers and discretions (including power to raise money by mortgage or charge) which a personal representative had with respect to personal estate at common law. See also §§ 2166, 2169 *post*.

2166. Where an infant is absolutely entitled under a testament or intestacy to property of a deceased person, and no trustees of such property are appointed by the testament, if any, the personal representatives may appoint a trust corporation, or two, three, or four individuals (including, if they wish, one or more of their own number), to act as such trustees. On this appointment, the representatives, as such, are discharged from further liability in respect of the property.

Power to appoint trustees of infants' property

Administration of Estates Act, 1925, s. 42.

For the meaning of "trust corporation" see Trustee Act, 1925, s. 68 (18).

2167. Any one of several co-representatives can give a good legal title to any part of the personal estate (other than chattels real) of the deceased.

Powers of single representative

Cole v. Miles (1852), 10 Hare, 179.

But if one of several co-representatives, after he has ceased to own any part of the estate as representative, and has begun to own

it as trustee, sells or pledges it without the assent of his co-trustee, the transaction can be set aside as against the purchaser or pledgee *Attenborough v. Solomon*, [1913] A.C. 76).

But—

- (i) the concurrence of all the representatives or an order of the Court is necessary to the disposition of any part of the real estate (including chattels real) of a testator ;

Administration of Estates Act, 1925, ss. 2 (2), 55 (1) (xix).

It may be noted also that the transfer by personal representatives of shares in limited and other companies, and of stock registered in the books of the Bank of England, is governed by special rules (Companies Act, 1929, s. 62 (1) ; National Debt Act, 1870, s. 23).

- (ii) the Court may refuse to enforce an equitable claim founded on an act done by one representative against the wish of his co-representatives ;

Lepard v. Vernon (1813), 2 Ves. & B. 51.

Sneesby v. Thorne (1855), 7 De G. M. & G. 399.

Re Ingham, Jones v. Ingham, [1893] 1 Ch. at p. 360.

- (iii) one representative cannot, without the sanction of the Court, sell any part of the assets to another.

Re Norrington, Brindley v. Partridge (1879), 13 Ch. D. 654.

*Legatee
also a repre-
sentative*

2168. The fact that a legatee is also a personal representative of the testator does not prevent him giving a good title as legatee to a purchaser for valuable consideration, provided that—

- (i) the purchaser has no notice of any debts of the testator remaining unpaid ; *and*
- (ii) the circumstances are such that the purchaser is entitled to assume an assent by the personal representative to the legacy ; *and*

Graham v. Drummond, [1896] 1 Ch. 968.

- (iii) the property purchased does not remain under the control of the personal representative (a)

or the Court ^(b) for the purpose of administering the estate of the testator.

(a) *Noble v. Brett* (1858), 24 Beav. 499.

(b) *Hooper v. Smart* (1875), 1 Ch. D. 90.

For the protection of a purchaser of real estate, including leaseholds, see § 2163 *ante*.

2169. At common law, a personal representative *Underleases by a representative* could grant an underlease of the leasehold property of the deceased, but only if this course was necessary for the due administration of the estate ; and the underlessee only got a good title if in fact it was necessary to make the underlease ; but the representative could not give the underlessee an option to purchase the head lease at a future time.^(a) This power appears now to have been extended by statute.^(b)

(a) *Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 236.
Re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. at pp. 844-845.

Johnson v. Clarke, [1928] Ch. 847.

(b) Administration of Estates Act, 1925, s. 39 (1).

Section 39 (1) of the Act (see *ante*, § 2165 and n.) extends the common law powers over personalty to cases where there is a minority or life interest. It also gives representatives the powers of trustees for sale. These include (Law of Property Act, 1925, s. 28) powers of disposition under the Settled Land Act, 1925 which include power to make leases (s.s. 41 *et seq.*) and presumably sub-leases (see s. 117 (1) (ix)) and to grant options exercisable within ten years (s. 51).

2170. Subject to the directions of the testament *Allowance of claims and compromises* (if any), a personal representative may pay or allow any debt or claim against the deceased's estate on any evidence that he thinks sufficient ;^(a) and he has the powers with regard to accepting a compromise of a claim by the estate described in § 1773 *ante*.^(b) He may (possibly) compromise the claim of a co-representative against the estate ; provided that such a compromise is beneficial to the estate.^(c) But a compromise made between co-representatives as to the claim of one of them will not bar the rights of

those interested in the estate to investigate the accounts.^(d)

(a) Trustee Act, 1925, s. 15 (c).

(b) *Ibid.*

(c) *Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622.

But see the remarks of Lord Eldon in *Cook v. Collingridge* (1823), Jac. at p. 621 ; and *De Cordova v. De Cordova* (1879), 4 App. Cas. at p. 703. He cannot safely make such a compromise without the sanction of the Court (*Re Houghton, Hawley v. Blake, ubi supra*, at p. 626).

(d) *Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413.

Appropriation to meet legacies

2171. The representative may appropriate any part of the real or personal estate, including things in action, of the deceased, in its actual state of investment at the time of appropriation, in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, whether settled or not, as to the representative may seem reasonable, according to the respective rights of the persons interested in the property of the deceased ; except that no appropriation may affect prejudicially any specific devise or bequest.^(a) For an appropriation, the following consents must in general be obtained :—

- (i) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person ;
- (ii) when made in respect of any settled legacy, share, or interest, the consent of the trustee thereof (not being also the personal representative), or the person who may for the time being be entitled to the income. If the person whose consent is required is a minor or lunatic, the consent may be given on his behalf by his parents, guardian, committee receiver, etc., as the case may be.^(b)

But no consent (except of the trustee of a settled legacy, share, or interest) is required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time.^(c) An appropriation duly made binds all persons interested in the property of the deceased whose consent to the appropriation is not required ; but, in making it, the representative must have regard to their rights.^(d)

(a) Administration of Estates Act, 1925, s. 41 (1) (i). (This includes contingent legacies (*ibid.* sub-sect. (8).)

(b) *Ibid.* s. 41 (1) (ii).

(c) *Ibid.* s. 41 (1) (iii).

(d) *Ibid.* s. 41 (4), (5).

An assent or conveyance (*ibid.* s. 41 (3)) by the representative in pursuance of an appropriation made with the beneficiary's consent involves a contractual element and so may attract *ad valorem* stamp duty (*Jopling v. I.R.C.*, [1940] 2 K.B. 282).

2172. Whenever there is a doubt as to the person entitled to receive a payment from the estate, and whenever any person entitled to receive a payment cannot give a valid discharge for such payment, the personal representative may pay the sum due into Court.^(a) If he pays into Court where no reasonable doubt exists, merely in order to escape responsibility, he must bear the costs occasioned by his act.^(b)

Payment of legacies into Court

(a) *Re Parker's Will* (1888), 58 L.J. (Ch.) at pp. 24-5.

Trustee Act, 1925, s. 63 (see § 1744, *ante*).

(b) *Re Elliot's Trusts* (1873), L.R. 15 Eq. 194.

2173. The provisions of § 1778 apply to co-representatives ;^(a) unless it is clear that a testator intended to give powers only to the persons named in their individual capacity, and not to them or any one who might succeed them in the office of his representative.^(b)

Survival of powers

(a) Trustee Act, 1925, s. 18 (except an executor who has renounced or not taken out probate (*ibid.* s. 18 (4)).

(b) *Re Smith, Eastick v. Smith*, [1904] 1 Ch. at p. 144.

TITLE VI—PERSONAL RIGHTS AND LIABILITIES OF THE REPRESENTATIVE

*Personal
responsi-
bility to
strangers*

2174. The representative is personally liable, irrespective of assets, to strangers for any wrongful acts done ^(a) or contracts made by him ^(b) in the course of the administration of the estate.

(a) *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199.

(b) *Labouchere v. Tupper* (1857), 11 Moo. P.C.C. at p. 221.

Farhall v. Farhall, Ex parte London and County Banking Co. (1871), 7 Ch. App. at p. 128.

Watling v. Lewis, [1911] 1 Ch. 414.

The last case shows that even an express attempt to negative such liability by a clause in the contract will be ineffectual.

*Indemnity
of repre-
sentative*

2175. When acts are done or contracts are entered into by a representative in the regular pursuance of powers given by law to him, he is entitled to be indemnified in respect of his liability thereby incurred, out of the assets, in priority to the creditors and beneficiaries of the deceased; ^(a) and this right of indemnity exists notwithstanding that the estate is insolvent. ^(b)

(a) *Benett v. Wyndham* (1862), 4 De G.F. & J. 259 (trustee).

Sharp v. Lush (1879), 10 Ch. D. at p. 472 (funeral expenses).

Stott v. Milne (1884), 25 Ch. D. at p. 715, *per* Lord SELBORNE, C. (costs).

Re Raybould, Raybould v. Turner, ubi supra.

(b) Bankruptcy Act, 1914, ss. 33 (3), (5), 130 (6).

Administration of Estates Act, 1925, s. 34 (1), (3), and 1st Sch. Pt. I, para. 1.

"Administration expenses", to which priority is now expressly given by the Act of 1925 (*ante*, §§ 2125, 2146), appear to include the rights of indemnity to which this paragraph refers: e.g. liabilities properly incurred in carrying on deceased's business with a view to sale or winding up (*ante*, § 2161; *Dowse v. Gorton*, [1891] A.C. at p. 199).

*Limited
indemnity*

2176. If the representative does acts ^(a) or enters into contracts ^(b) in the regular pursuance of a power

conferred upon him by the testator, he is entitled (as against the beneficiaries) to be indemnified against liability arising therefrom, out of any assets allowed by the testator to be employed in the execution of such power.^(c)

- (a) *Re Raybould*, *Raybould v. Turner*, [1900] 1 Ch. 199.
- (b) *Re Ballman*, *Ex parte Garland* (1804), 10 Ves. at p. 120.
Re Johnson, *Shearman v. Robinson* (1880), 15 Ch. D. 548.
Re Evans, *Evans v. Evans* (1887), 34 Ch. D. 597.
- (c) *Re Ballman*, *Ex parte Garland* (1804), 10 Ves. 110.

In *O'Neill v. McGrorty*, [1915] 1 I. R. 1, it was held that where no specific fund had been set apart by the testator, a receiver and manager appointed by the Court to carry on the testator's business had a right to resort to the general estate, including such parts of it as had been carried to the separate credits of legatees.

2177. The personal representative's right of indemnity under § 2176 is subject to— *Restrictions on indemnity*

- (i) the claims of all the creditors of the deceased who cannot be proved to have assented expressly or by their conduct to the exercise of the power ;^(a)
- (ii) the rights of all legatees who have actually been paid ;^(b) *and*
- (iii) all claims by creditors or beneficiaries against the representative, in respect of any failure to administer the estate properly.^(c)

- (a) *Dowse v. Gorton*, [1891] A.C. 190.
Re Hodges, *Hodges v. Hodges*, [1899] 1 I. R. 480.
Re Oxley, *Hornby (John) & Sons v. Oxley*, [1914] 1 Ch. 604.

The last case shows that mere standing by is not an implied consent by creditors for this purpose.

- (b) *Re Ballman*, *Ex parte Garland* (1804), 10 Ves. at p. 120.
- (c) *Re Johnson*, *Shearman v. Robinson* (1880), 15 Ch. D. at pp. 552-3.

The fact that one of several representatives is in default will not prejudice the claim to indemnity of the other or others not in default (*Re Frith*, *Newton v. Rolfe*, [1902] 1 Ch. 342).

2178. When the representative has a right of *Subrogation of creditors*

indemnity under §§ 2176 and 2177, his creditors in respect of the transactions which give rise to the indemnity may stand in his place, and enforce their claims against the assets to the extent to which the representative is entitled to be indemnified.

Re Johnson, Shearman v. Robinson (1880), 15 Ch. D. 548.

Re Raybould, Raybould v. Turner, [1900] 1 Ch. 199.

A representative who trades with the assets of the deceased without authority is of course guilty of a breach of trust. Any profit which he makes belongs to the estate (*Vyse v. Foster* (1874), L.R. 7 H.L. at p. 329); and the creditors of the testator have a claim to be paid out of the assets prior to that of the creditors of the representative (*Re Millard, Ex parte Yates* (1895), 72 L.T. 823; *Re Oxley, Hornby (John) & Sons v. Oxley, ubi supra*). If, however, the creditors of the testator have expressly assented to this breach of trust, they are regarded as the principals of the representative, and, as such, are obliged to indemnify him (*Dowse v. Gorton, ubi supra*, at p. 208, *per* Lord MACNAGHTEN; *Re Millard, Ex parte Yates, ubi supra*, at p. 827, *per* Lord ESHER, *diss.*).

*Promise
by repre-
sentative*

2179. The representative may by his own promise render himself personally liable to satisfy any of the liabilities to which the estate of the deceased is subject. Such a promise must satisfy all the requirements of a valid contract;^(a) and it is not enforceable unless it also complies with the provisions of § 130 *ante*.^(b)

(a) *Rann v. Hughes* (1778), 7 Term Rep. 350, n.

(b) Statute of Frauds, 1677, s. 4.

But one who is not yet a representative, is not an executor or administrator within the provisions of the statute (*Tomlinson v. Gill* (1756), Amb. 330).

*Personal
liability on
admission
of assets*

2180. The representative is personally liable, irrespective of assets, to pay any debt in respect of which judgment *de bonis testatoris* has been recovered against him;^(a) and to pay debts or legacies if by his words^(b) or conduct^(c) he admits that he has received assets sufficient to pay them. An admission cannot be withdrawn unless it is clearly proved to have been made by

mistake ;^(d) but if, after an admission, new facts as to the financial condition of the estate come to light, the admission made in ignorance of those facts is not binding.^(e)

(a) *Re Marvin, Crawter v. Marvin*, [1905] 2 Ch. 490.

Failure to plead *plene administravit* is, in fact, treated as an admission of assets.

(b) *Rothwell v. Rothwell* (1825), 2 Sim. & St. at p. 218, *per* LEACH, V.C.E.

Barnard v. Pumfrett (1841), 5 My. & Cr. 63.

(c) *Corporation of Clergymens Sons v. Swainson* (1748), 1 Ves. Sen. 75 (payment of interest on legacies).

Barnard v. Pumfrett, *ubi supra* (part payment of legacies).

Re Brogden, Billing v. Brogden (1888), 38 Ch. D. at p. 569, *per* COTTON, L.J. (payment of interest on legacies).

If a legatee has recovered judgment against a representative *de bonis propriis* on an admission of assets, and the judgment has been satisfied, a creditor can follow the assets paid over to the legatee, provided that the legatee has in fact been paid from the assets, and not from the property of the representative (*Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. at p. 569, *per* COTTON, L.J.).

(d) *Drewry v. Thacker* (1819), 3 Swan. at p. 548, *per* Lord ELDON, L.C.

(e) *Horsley v. Chaloner* (1750), 2 Ves. Sen. at p. 85, *per* STRANGE, M.R.
Payne v. Little (1856), 22 Beav. 69.

2181. Payment of one debt is, *primâ facie*, an admission that the assets are sufficient to pay all debts of a superior degree ;^(a) and payment of one pecuniary legacy is, *primâ facie*, an admission that the assets are sufficient to pay all pecuniary legacies.^(b) But the circumstances in which such payments were made may negative this rule.^(c)

(a) *Cadbury v. Smith* (1869), L.R. 9 Eq. at pp. 41-2.

It is, of course, no admission of assets to pay other debts of equal degree ; because the representative has a right to prefer one debt to another of equal degree (*ante*, § 2132).

(b) *Cook v. Martyn* (1737), 2 Atk. at p. 3, *per* Lord HARDWICKE, C.

Semble : the inference would not arise from payment of a preferred pecuniary legacy (*ante*, § 1988).

(c) *Postlethwaite v. Mounsey* (1842), 6 Hare, 33, n.

Cadbury v. Smith (1869), L.R. 9 Eq. 37.

*Payment
an admission
of assets*

Devastavit

2182. A representative is personally liable, irrespective of assets, to the party damaged to make good the loss if—

- (i) he breaks any of the legal rules as to the conduct of the administration of the estate ; *or*,

Norman v. Baldry (1834), 6 Sim. 621 (payment to a legatee, a debt being outstanding).

Midgley, Re Midgley v. Midgley, [1893] 3 Ch. 282 (payment of a claim which was not enforceable ; but see § 2138 *ante*.)

Re Stevens, Cooke v. Stevens, [1898] 1 Ch. at pp. 168–9, *per* LINDLEY, M.R.

- (ii) a loss is caused to the estate either by his misfeasance or by the neglect of his duties ; *or*,

Hall v. Hallet (1784), 1 Cox, Eq. Cas. 134 (allowing interest-bearing debts to run on when he had in hand enough to pay them).

Tebbs v. Carpenter (1816), 1 Madd. 290 (neglect to recover arrears of rent).

Delay in taking out probate does not amount to a *devastavit* (*Re Stevens, Cooke v. Stevens, ubi supra*).

- (iii) having got possession of the assets, he loses them by his wilful default.

Job v. Job (1877), 6 Ch. D. 562.

Trustee Act, 1925, ss. 30 (1), 68 (17).

At the common law, the representative was absolutely responsible for any assets which came to his hands. But this was never the rule in equity ; and the equitable rule now prevails in all Courts (*Job v. Job, ubi supra*). The remedy of the injured party is either an action for administration and an account, or a personal action against the representative alleging a *devastavit* (*Re Stevens, Cooke v. Stevens, ubi supra*). On the death of a representative who has committed a *devastavit*, his liability therefor passes to his personal representatives (Administration of Estates Act, 1925, s. 29 ; Law Reform (Miscellaneous Provisions) Act, 1934, s. 1). But, like a trustee, a personal representative is not usually liable for the defaults of agents employed by him in good faith in the administration of the estate (Trustee Act, 1925, ss. 23 (1), 30 (1) ; *ante*, §§ 1746, 1747 ; *Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572) ; and when guilty of a breach of duty he may be given relief by the Court (Trustee Act, 1925, ss. 61, 62, 68 (17) ; *ante*, §§ 1784, 1793).

*Barred
after six
years*

2183. An action for damages in respect of a *devastavit* against a personal representative is barred

at the expiry of six years from the happening of the act or default alleged as the cause of action ;^(a) and, in an action against a personal representative to recover money honestly but mistakenly paid away by him as such representative, the defendant can plead the provisions of the Limitation Act, 1939, s. 19 (2), whether the action is by a creditor or by a beneficiary, and whether it is in form an action to recover money or an action for administration.^(b)

- (a) *Thorne v. Kerr* (1855), 2 K. & J. 54.
Lacons v. Warmoll, [1907] 2 K.B. 350.
 Limitation Act, 1939, ss. 2 (1), 19 (2).

The period of limitation for an action for an account is six years also (Act of 1939, s. 2 (2)). A personal action on a *devastavit* appears, at common law, to be in the nature of an action in contract or tort (see *Lacons v. Warmoll*, *supra*, at pp. 361-362, 363-364) and so to fall within section 2 (1) of the Act of 1939. But it is also in the nature of an action for breach of trust (which includes the duties of a personal representative, s. 31 (1)), and so is within section 19 of the Act ; so that six years would not bar if defendant has been fraudulent or still has the assets or has converted them (s. 19 (1)).

- (b) *Re Blow, St. Bartholomew's Hospital (Governors) v. Cambden*, [1914] 1 Ch. 233 (a decision upon the equivalent provisions of the Trustee Act, 1888, now repealed).

For particulars of the statutory provision see *ante*, § 1791.

2184. A creditor who has obtained a personal order against a representative for payment *de bonis propriis* of a debt due from the deceased cannot enforce it by an order for attachment of the representative, as a person acting in a fiduciary capacity in default under an order by a court of equity, under the provisions of Section 4 of the Debtors Act, 1869.

No attachment on personal order

Re Thomas, Sutton, Garden & Co., Ltd. v. Thomas, [1912] 2 Ch. 348.

The principle appears to be that the fiduciary relationship, which ordinarily exists between the representative and the deceased's creditor, terminates when the creditor obtains a personal order or judgment against the representative ; for there is no fiduciary relationship between judgment creditor and judgment debtor (*Re Thomas, ubi supra*). But, presumably, if the plaintiff can show means, the representative can, in such a case, be committed to prison for a limited period under the provisions of s. 5 of the Act.

*No liability
for co-repre-
sentative*

2185. One representative cannot be made personally liable for the acts or defaults of a co-representative ;

Trustee Act, 1925, s. 30.

Hargthorpe v. Milforth (1594), Cro. Eliz. 318.

Dix v. Burford (1854), 19 Beav. at p. 412.

unless—

- (i) he unnecessarily does an act by which his co-representative gets sole control of any of the assets ; *or*

Shipbrook (Lord) v. Hinchinbrook (Lord) (1805), 11 Ves. 252.

Clough v. Bond (1838), 3 My. & Cr. 490.

Re Gasquoine, Gasquoine v. Gasquoine, [1894] 1 Ch. 470.

- (ii) he negligently acquiesces in, or facilitates, breach of duty by the co-representative.

Booth v. Booth (1838), 1 Beav. 125.

Styles v. Guy (1849), 1 Mac. & G. 422.

The principle is that, like a trustee (*ante*, § 1747), he is ordinarily liable only for his own acts, neglects or defaults, and is not liable for any loss caused by another person's act unless it happens through his own "wilful default" (Trustee Act, 1925, ss. 30 (1), 68 (17), which implies some consciousness of negligence or breach of duty, or a recklessness in the performance of a duty (*Re Vickery, Vickery Stephens*, [1931] 1 Ch. at p. 584). *Semble* : there should, on principle, be a right of contribution among co-representatives who have become liable through a joint fault (*Dering v. Winchelsea (Ear)* (1787), 1 Cox, Eq. Cas. at p. 321, per EYRE, C.B. ; *Robinson Harkin*, [1896] 2 Ch. 415). Such a right may arise where trustees jointly commit a breach of trust (*ante*, § 1783), and between joint tortfeasors (Law Reform (Married Women and Tortfeasors) Act 1935, s. 6).

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